(1)

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE:

DONALD O. PINKSTON,

Petitioner.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

WILLIAM A. PORTEOUS, III
PORTEOUS, HAINKEL
AND JOHNSON, L.L.P.
704 Carondelet Street
New Orleans, Louisiana 70130
(504) 581-3838

Attorney for Petitioner.

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QUESTIONS PRESENTED

I. Must the Louisiana Attorney Disciplinary Rules and Procedures which cover the disbarring of attorneys comply with both procedural and substantive due process?

   1. Are the notice requirements of procedural due process infringed by application of permanent disbarment and foreclosure of employment and contractual relationship with lawyers rules where permanent disbarment and employment preclusion were not a penalty when Petitioner wrongfully violated "the most fundamental duty of an officer of the court" by making false statements to a judge and concealing evidence from the court which should have been revealed and injuring clients through neglect of legal matters, failure to account and to return unearned legal fees?

   2. Does "fundamental fairness" and "fair warning" require that the punishment of permanent disbarment and employment preclusion be known at the time of wrongful conduct?

II. May Louisiana's new Supreme Court Rules providing for a penalty of permanent disbarment and employment preclusion be applied retroactively without violating the constitutional prohibition against state *ex post facto* laws?

LIST OF PARTIES

Counsel of record for Petitioner certifies that the following are parties and counsel who have an interest in the outcome of this case.

Donald O. Pinkston, formerly an attorney at law of New Orleans, Louisiana.

The Supreme Court of Louisiana, the legal entity having plenary power over membership in the Bar of Louisiana;

The Louisiana Attorney Disciplinary Board, a statewide agency established by the Supreme Court of Louisiana to administer the lawyer discipline and disability system;

Charles P. Plattsmier, Chief Disciplinary Counsel, Louisiana Attorney Disciplinary Board, Baton Rouge, Louisiana, counsel with prosecutorial authority in this cause;

William A. Porteous, III, of New Orleans, Louisiana, Counsel for Petitioner.

RELATED PROCEEDING

A Petition for Writ of Certiorari has been filed in this Court by Petitioners, Laudumiey and Mann, No. 03-460. That petition involves some of the due process issues asserted herein and the *ex post facto* claim. On December 1, 2003, the Court denied the Petition sought by Laudumiey and Mann.

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PETITION FOR WRIT OF CERTIORARI

Donald O. Pinkston, Petitioner, hereby petitions the Court to issue a writ of certiorari to review the judgment and opinion of the Supreme Court of Louisiana in Attorney Disciplinary Proceedings wherein Petitioner was permanently disbarred and permanently enjoined from employment by or contractual relationships with any Louisiana lawyer. After application for a rehearing, the final decree of the Supreme Court of Louisiana was entered September 5, 2003.

OPINIONS BELOW

The opinion of the Supreme Court of Louisiana, which is reproduced in Appendix D commencing at page 27a, is officially reported at 2002-B-3251, 2002-B-3252 (La. 5/20/03), 852 So.2d 966, rehearing denied.

The opinion denying a rehearing by the Supreme Court of Louisiana is reproduced in Appendix A and is officially reported at 2002-B-3251, 2002-B-3252 (La. 9/5/-03). (App. A, p. 1a).

JURISDICTIONAL GROUNDS

The decision of the Supreme Court of Louisiana was entered on May 20, 2003 (App. D, p. 27a). Petitioner applied for a rehearing and that rehearing was denied in an opinion of the Louisiana Supreme Court dated September 5, 2003 (App. A, p. 1a). This court has jurisdiction to review the decision of the Supreme Court of Louisiana on writ of certiorari pursuant to 28 U.S.C. Section 1257.

STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, Sec. 10, Clause 1, which states in pertinent part that "No state shall . . . pass any . . . *ex post facto* law."

U.S. Const. amend. XIV, Sec. 1, which states in pertinent part that "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

Louisiana Supreme Court Rule XIX, relative to Lawyer Discipline after August 1, 2001 (App. F, p. 47a).

Louisiana Rules of Professional Conduct 5.5, Effective July 1, 2002. (App. I, p. 56a).

STATEMENT OF THE CASE

Petitioner, a black, criminal defense attorney, was found to have engaged in professional misconduct during the years 1995, 1996, 1997 and 1998. Petitioner's wrongful conduct is outlined in Appendix D, pp. 28a-34a. The most serious violation of Petitioner involved making false statements to a judge and concealing from a judge evidence which should have been revealed. (App. D, pp. 28a-30a). This conduct resulted in the filing of formal charges against Petitioner in April 1999. (App. D, p. 34a). Petitioner was also charged with injuring his clients through neglect of legal matters, failure to account and failure to return unearned legal fees with formal charges being brought in May 2001 as to these matters. (App. D, p. 34a).

Prior to August 1, 2001, the Louisiana Supreme Court allowed disbarred lawyers to apply for readmission to the Bar after being disbarred for five years (App. E, Section 24, pp. 45a-46a). Subsequent to August 1, 2001 the

Louisiana Supreme Court embraced two kinds of disbarment: disbarment and permanent disbarment. (App. F with Commentary, pp. 47a-52a). The Supreme Court of Louisiana issued Guidelines indicating what conduct it believed might warrant Permanent Disbarment. (App. F, pp. 51, 52). All of these changes were effective August 1, 2001.

Prior to July 1, 2002, a disbarred lawyer in Louisiana might work as a paralegal, office administrator, legal researcher or clerk. Many disbarred lawyers did so. There was no prohibition against a disbarred lawyer working in some capacity with lawyers. On July 1, 2002, the Supreme Court of Louisiana changed Rule 5.5 of the Louisiana Rules of Professional Conduct to preclude a lawyer from engaging a disbarred lawyer in any capacity. (Compare Appendices H and I on the subject of Unauthorized Praceice of Law). (App. 55a and 56a).

The result is that since August 1, 2001 a lawyer who has been permanently disbarred has no option, as formerly, to apply for readmission after 5 years of disbarment. Since July 1, 2002, any disbarred Louisiana lawyer is foreclosed from having any kind of engagement with a Louisiana lawyer. The result is professional death. Formerly a lawyer who had been disbarred might seek readmission and might work for or contract with another lawyer during his time of disbarment.

At the time charges were brought against Petitioner Pinkston there was no Permanent Disbarment Rule and Professional Employment Preclusion Rule. Throughout the proceedings examining Petitioner's conduct, the Disciplinary Counsel never sought "Permanent Disbarment;" the only thing mentioned was "Disbarment."

Louisiana employs a three tiered system of investigation and punishment of wrongful conduct. There is a hearing before a fact finding body known as a Hearing Committee. This is followed by an intermediate appellate review before a panel of the Louisiana Disciplinary Board. Final review is before the Supreme Court which is the ultimate fact finder and has original jurisdiction in matters of Bar discipline. (App. D, p. 39a). The Louisiana Supreme Court accords facts found by the bodies below a respect through the manifest error rule. (App. D, p. 39a).

The first time Permanent Disbarment was mentioned in Petitioner's case was in oral argument in the Supreme Court of Louisiana which occurred between April 4, 2003 and the permanent disbarment decision of May 20, 2003. (App. B, p. 7a, App. C, pp. 16a-17a).

Until final argument in the Louisiana Supreme Court in April 2003, no permanent disbarment had been suggested. Louisiana Disciplinary Counsel had filed charges seeking disbarment and after amendment of the Disciplinary Rules in 2001 never amended the relief sought to embrace permanent disbarment. In addition to the charges, Disciplinary Counsel wrote at least seven briefs in the matter and never sought permanent disbarment. (App. B, pp. 4a-7a). No hearing committee or Disciplinary Board recommended permanent disbarment as a sanction. (App. B, p. 6a and App. D, pp. 35a-38a).

The first written mention of permanent disbarment as a sanction for Petitioner's conduct was in the opinion of the Louisiana Supreme Court of May 20, 2003.

Petitioner sought a rehearing in the Supreme Court of Louisiana of its May 20, 2003 decision alleging violations of due process of law and the *ex post facto* prohibition by virtue of applying the permanent disbarment

rule to Petitioner when his actions had occurred before the permanent disbarment sanction and that punishment had never been sought in any proceedings prior to oral argument in the Supreme Court of Louisiana just prior to the May 2003 decision of that court (App. B, p. 7a).

The Supreme Court of Louisiana denied rehearing and indicated that the imposition of the permanent disbarment rules was procedural and not substantive and therefore was not violative of due process or *ex post facto* prohibitions. (App. A, pp. 1a-2a).

Following the denial of a rehearing on September 5, 2003, Disciplinary Counsel advised Petitioner that the Supreme Court had issued an order of July 1, 2002 amending the Rules of Professional Conduct prohibiting any kind of legal employment or engagement of disbarred lawyers by Louisiana lawyers. (App. G, pp. 53a-54a and App. I, p. 56a).

From the decision of the Supreme Court of Louisiana imposing permanent disbarment upon Petitioner and the prohibition of any allied legal employment of Petitioner, Petitioner brings this application for a writ of certiorari to the Court.

ARGUMENT

REASONS FOR GRANTING THE WRIT

Lawyer discipline is on the ascendancy in the United States. The plenary power of courts to control those who may appear before them must accommodate and respect the constitutional rights of lawyers subject to discipline. Clearly, the lawyer is entitled to procedural due process. Where the right to practice a profession is at issue, more than procedural due processes is required.

Public perception of the lawyer as motivated by unprincipled greed without any anchor in or dedication to helping others in an ethical way has led the Bar and the supreme courts of the states to vigorous prosecution of lawyer wrongdoing. This movement of the last decade in Louisiana has taken the form of vigorous enforcement of the Rules of Professional Conduct by zealous prosecution and harsh judgment in the Supreme Court of Louisiana. Petitioner is a Louisiana recently permanently disbarred lawyer.

As part of its effort to improve the Bar, the Louisiana Supreme Court also enjoined other lawyers from employing or contracting with disbarred lawyers. (App. I, p. 56a). Thus any use of his knowledge or skills is now foreclosed to a disbarred lawyer.

Due process, substantive and procedural, has always protected the citizen from unfair exercise of power by government. Courts are the great protector of the rights of citizens in their contests with governmental authority. The greatest malfactors are entitled to the protection of substantive and procedural due process and the prohibition against *ex post facto* laws. Where the lawyer is involved courts should be vigilant in the protection of the lawyer-citizen in his contest with those who control membership in the legal profession. Courts in regulating lawyers subject to their power, no less than all government, should be controlled by substantive and procedural due process.

This case involves a punishment of misconduct by a lawyer. After the time of the misconduct and commencement of the prosecution, Louisiana amended its disciplinary rules to provide for two categories of disbarred lawyers. The two classifications of disbarred lawyers are: the disbarred and the permanently disbarred. The former could and still can apply for readmission as pre-

viously; the latter were enjoined from ever seeking readmission; this was new. (App. F, pp. 47a-52a). (The sanction of permanent disbarment was added to Rule XIX, Section 10, by order of the Louisiana Supreme Court dated July 19, 2001, effective August 1, 2001. (App. F, p. 52a).

The Louisiana Supreme Court characterizes its rule changes as procedural. (App. A, p. 2a). This cannot be correct. Prior to August 2001, a lawyer could reapply for admission to the Bar after five years. Prior to July 2002, a disbarred lawyer could work as a paralegal or an administrator. The rule changes are substantive from the viewpoint of the lawyer who has lost the privilege of reapplying for admisson to the Bar and cannot use his skill in any remunerative capactiy. The matter is analogous to a situation where a convicted criminal sees the privilege of applying for a pardon or parole abolished.

The new Louisiana disbarment rules implicate due process and *ex post facto* issues which are of substantial importance to the public and the Bar.

In the broadest thinking, this cause involves the plenary power of a court to control its Bar as opposed to the rights of citizen lawyers to practice a profession with the protection of full due process of law. This is important to the courts and the Bar.

PART I

Question I Presented, Due Process

DISCIPLINARY PROCEEDINGS AGAINST LAWYERS SHOULD ACCORD LAWYERS UNDER THREAT OF DISBARMENT FULL PROCEDURAL AND SUBSTANTIVE DUE PROCESS.

This Court visited the lawyer discipline due process issue in 1968 in *In re: Ruffalo,* 390 U.S. 544 (1968) holding that a lawyer involved in disciplinary proceedings was enmeshed in matters which were "quasi criminal" and therefore entitled to procedural due process, notice and an opportunity to be heard. In 1982, the Court recognized that a lawyer had a right to have constitutional issues heard in a disciplinary proceeding. *Middlesex County Ethics Committee v. Garden State Bar Ass'n.,* 457 U.S. 423 (1982).

This petition on behalf of a disbarred lawyer asks the Court to address the further questions of whether the lawyer involved in disciplinary proceedings is entitled to both substantive and procedural due process.

Permanent disbarment with employment preclusion is a kind of professional death sentence. Where the sanction is so high, the lawyer should know from the time of the offense forward what the possible sanction may be. *Lankford v. Idaho,* 500 U.S. 110 (1991). Not only must there be notice of the charges, but notice of the punishment as well, especially where a range of punishments might be at issue. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 574 (1996).

1. The Notice Requirement of Procedural Due Process Is Infringed by the Application of Louisiana's New Permanent Disbarment and Employment Preclusions Rules to Petitioner When Those Rules Were Not in Effect at the Time of Petitioner's Wrongful Conduct and Only in Final Argument to The Louisiana Supreme Court Was Permanent Disbarment First Mentioned.

The Court in *In re: Ruffalo, supra,* stated:

> Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. He is accordingly entitled to procedural due process, which includes fair notice of the charge. 390 U.S. at 550.

In *Ruffalo,* the Respondent was not provided with notice of the charge which led to his disbarment until after he and another witness had already testified at the disciplinary hearing. The Court found that this constituted a procedural due process violation.

If the sanction of employment preclusion and permanent disbarment is applied retroactively, the Petitioner is deprived of due process in that he did not have adequate notice of these potential sanctions at the time of his alleged offense.

The U.S. Supreme Court in *Ruffalo* held:

> [Lawyer disciplinary proceedings] are adversary proceedings of a quasi criminal nature. The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.

* * *

> This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process. 390 U.S. at 551 [Citations omitted.]

Similarly, if the Petitioner, Pinkston, had notice of the reach of the grievance procedure at the time he acted wrongfully with respect to a court and to his clients, he might not have acted as he did. Punishment is a deterrent. Had Petitioner Pinkston known that the Guidelines (App. F, pp. 51a-52a) would be applied in his case he could have presented evidence relative to them. The Guidelines were not in existence at the time of his wrongful conduct and his earliest hearings. Petitioner was never notified that permanent disbarment would be a possible sanction until final argument. No permanent disbarment was ever sought until oral arguments in the Supreme Court of Louisiana. Mr. Pinkston and Mr. Ruffalo have much in common. After joining issue, they were both confronted with a changed landscape. In Mr. Pinkston's case, it came in final arguments in the Supreme Court with the suggestion for the first time of permanent disbarment.

Therefore, as a result of procedural due process considerations, the sanction of permanent disbarment and employment preclusion should only be applied prospectively and not retroactively to the time of the offense.

The new rules should not have been applied to offenses occurring and prosecutions commenced prior in time to the new rules.

2. Fundamental Fairness In A Proceeding Involving Liberty and Property Is Incorporated Within The Concept of Due Process of Law as Understood In This Nation And Dictates That The Punishment of Permanent Disbarment and Professional Employment Preclusion Be Known At The Time of the Offense So As To Satisfy "Fair Warning" As A Requirement of Substantive Due Process.

The United States through Article V and Amendment XIV of the Constitution is committed to requiring due process. Where a government not only terminates present employment but forecloses an entire occupational field, that action must comport with full due process of law. A citizen of this nation has a liberty and property interest in following a trade or occupation. *Conn v. Gabbert,* 526 U.S. 286, 291-92 (1999); *Application of Griffiths,* 413 U.S. 717, 722-27 (1973); *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 572 (1972); *Schware v. Board of Bar Examiners of New Mexico,* 353 U.S. 232 (1957); *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923).

The Louisiana Rule change as to employment of a disbarred lawyer came long after Mr. Pinkston's offenses and prosecution. The Rule change about permanent disbarment likewise came after Mr. Pinkston's offenses and prosecution.

"Fair warning" is an essential rule in all matters that involve criminal conduct. *Dobbert v. Florida,* 432 U.S. 282, 297-98 (1977). Justice Cardozo thought that: "[T]he Fourteenth Amendment proscribed certain state procedures, not because proscription was spelled out in one of the Bill of Rights but because the matter offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Commonwealth of Massachu-*

setts, 291 U.S. 97, 105 (1934). Indeed, the idea of "fair warning" is "implicit in the concept of ordered 'liberty,' " *Palko v. Connecticut,* 302 U.S. 319, 325 (1937). Incorporation of fundamental ideas implicit in the concept of ordered liberty is an ongoing process.

Where liberty and property legally are protected, wrongful conduct and the penalty for wrongful conduct are twined in any rule or statute. This exists because of the requirement of a "fair warning." It is part of our concept of "ordered liberty." To denounce conduct and change the penalty after the conduct and then enforce the change is to abandon that concept of "ordered liberty," which is fundamental and protected by due process in this nation.

"Fair warning" embraces notice of punishment. *Lankford v. Idaho, supra; BMW of North America v. Gore, supra.* The proceedings herein were quasi-criminal and Petitioner is entitled to the protections of substantive and procedural due process of law protected in the Federal constitution. *In re: Ruffalo, supra; Application of Gault,* 387 U.S. 1, 33 (1967).

Heightened Due Process

Courts have always had plenary power over the Bar in matters of discipline. Never have the citizen's full constitutional protections against governmental action been part of Bar discipline. The accused lawyer has never had the protection of separation of powers, checks and balances and resort to an independent judiciary. His sole reliance has had to be the integrity of the judiciary with its inherent "self-restraint" in the exercise of judicial power. In these times of increased public and judicial

scrutiny of lawyer conduct, a heightened sense of due process substantive as well as procedural should protect the lawyer.

PART II

Question II Presented, *Ex Post Facto*

BECAUSE LAWYER DISCIPLINARY PROCEEDINGS ARE QUASI-CRIMINAL, THEY CANNOT INCREASE PUNISHMENT *EX POST FACTO* WITHOUT VIOLATING THE U.S. CONSTITUTION, ARTICLE I, § 10, CLAUSE 1.

"The focus of *ex post facto* inquiry is . . . whether any such change . . . increases the penalty by which a crime is punishable." *California Department of Corrections v. Morales,* 514 U.S. 499, 506 (1995); *Garner v. Jones,* 529 U.S. 244 (2000).

The Louisiana Supreme Court indicated that because it always had the power to disbar attorneys permanently, the change of the rule on five year application for readmission to a rule of permanent disbarment in certain egregious cases was a procedural change only. (App. A, p. 2a). This is a Frankfurter procedural/substantive or substantive/procedural conundrum. The conclusion remains that when Petitioner's actions occurred and opened him to the possibility of disbarment he would have been permitted to apply for readmission after five years disbarment with the Louisiana Supreme Court having discretion to allow readmission to the Bar. He could also have worked as a legal administrator or paralegal or law clerk. The fact that the Louisiana Supreme Court had the power does not alter the *ex post facto* issue. A legislature has the power to increase the punishment

for a crime at any time. The issue is retroactivity to the offense.

The language changes in the disbarment rule effective August 1, 2001 after Petitioner's offense and prosecution are set forth in the opinion of the Supreme Court of Louisiana. (App. D, p. 42a, fns. 7 and 8).

By abolishing the privilege of applying for readmission after five years, the disbarred Petitioner faces a change in the rules which reflects an increase in the penalty by which his crime is punished. Petitioner can never apply for readmission. When Petitioner was found to have wrongfully acted, if disbarred he could apply for readmission after five years. That is now foreclosed. At the time of his actions, Petitioner had not been warned by effective new rules that he might be permanently disbarred.

"Fair Warning" is the basis of the American commitment to the *ex post facto* prohibition. *Dobbert v. Florida*, 432 U.S. 282, 297-98 (1977). The commitment to a "fair warning" is rooted in Western and American political and legal thought, Story, *Commentaries on the Constitution of the United States*, Section 1367 (1833). Retroactivity was condemned by the *Corpus Juris* of Justinian and the canon law and is the root of the phrase "*Nulla Poena Sine Lege.*" Schwartz, *Commentaries on the Constitution of the United States*, Part III, Rights of the Person, Chapter 151, Section 392 (1968). Schwartz cites Radin, *Handbook of Roman Law*, 475 (1927), and 1 Blackstone, *Commentaries on the Law of England*, 46 (1765).

In *Federalist Papers, No. 44*, Madison declares that *ex post facto* laws "are contrary to the first principles of the social compact and in every principle of sound legislation." He declares that the prohibition is part of the "spirit"

and scope of our "fundamental charters." Prohibition of *ex post facto* laws was needed to erect "additional fences" against "dangers." Madison describes these fences as part of a constitutional barrier in favor of personal security and private rights. *Calder v. Bull,* 3 U.S. 386, 390, 3 Dall. 386 (1798), declared that *ex post facto* laws included laws which aggravated a crime and made it greater than it was when committed or changed the punishment and inflicted a greater punishment than the law annexed to the crime when committed.

Afterwards, in *Fletcher v. Peck,* 10 U.S. 87, 6 Cranch 87 (1810), it was held that *ex post facto* laws included those laws which rendered an act punishable in a manner in which it was not punishable when committed. See also, 1 Kent, *Commentaries on American Law,* 382 (1826). It can be seen from this thinking that the prohibition extends not only to making criminal, conduct which at the time it was conducted was not punishable, but also to increasing of punishment after the commission of the crime.

The Louisiana Supreme Court has many times set forth the rule that while lawyer disciplinary proceedings are primarily for the protection of the public, they are also punishment of the defaulting lawyer. *In re: Vaughan,* 2000-1892 (La. 10/27/00), 772 So.2d 87; *In re: Taylor,* 2000-2392 (La. 10/13/00), 770 So.2d 335; *In re: Estiverne,* 1999-0949 (La. 9/24/99), 741 So.2d 649; *In re: Ashy,* 1998-0662 (La. 12/1/98), 721 So.2d 859. Disciplinary proceedings involve punishment. All criminal laws exist for the protection of the public and part of the protection for the public is punishment of the offender. In this case, the amendment to Louisiana Supreme Court Rule XIX was passed after the date of Petitioner's offenses, it relates to the offenses and their

punishment and alters the situation of the accused Petitioner to his disadvantage. The permanently disbarred Petitioner may never apply for readmission or seek employment in a law office. That was not the rule when he committed his offenses. See also, *State v. Jordan,* 440 So.2d 716, 718 (La. 1983), rehearing denied (1987); *Weaver v. Graham,* 450 U.S. 24, 29 (1981).

Johnson v. United States, 529 U.S. 694 (2000) involved an *ex post facto* challenge to a federal statute which authorized a district court to impose an additional term of supervised release upon violation of the initial release conditions. The Court noted that the *ex post facto* law question is whether a party is made worse off by the application of the new law. In this case, it is clear that Pinkston, who lost the option of applying for readmission is "worse off". Petitioner is "worse off" even though his conduct occurred prior to August 1, 2001 when the Rule changed.

Lynce v. Mathis, 519 U.S. 433 (1997) involved a post conviction Florida statute which cancelled a prisoner's release credits which had been awarded to alleviate prison overcrowding. The Court held that this violated the *ex post facto* prohibition because it "must disadvantage the offender affected by it." *Id.* at 896, citing *Weaver v. Graham, supra.* Indeed, the Court relies upon the fundamental viability of *Calder v. Bull, supra.*

The right of Petitioner to seek readmission after five years is analogous to a prisoner seeking parole after serving a portion of his sentence. Changing the right to seek parole after serving a portion of the sentence offends *ex post facto* precepts. The prisoner is entitled to the benefit of the parole statute in effect at the time of his offense where parole is discretionary. In this case, Petitioner is like the prisoner seeking parole; he should be

allowed to come to the Supreme Court of Louisiana after five years and seek readmission and the court in its discretion might grant or deny the readmission application.

CONCLUSION

For the various reasons set forth above, this petition for writ of certiorari should be granted and/or the cause remanded to the Supreme Court of Louisiana with instructions.

Respectfully submitted,

WILLIAM A. PORTEOUS, III
PORTEOUS, HAINKEL
AND JOHNSON, L.L.P.
704 Carondelet Street
New Orleans, Louisiana 70130
(504) 581-3838
Fax: (504) 581-4069
Bar No. 10600

Attorney for Petitioner,
Donald O. Pinkston.

December 4, 2003

(2)

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IN THE

SUPREME COURT OF THE UNITED STATES

IN RE:

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APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

WILLIAM A. PORTEOUS, III
PORTEOUS, HAINKEL
AND JOHNSON, L.L.P.
704 Carondelet Street
New Orleans, Louisiana 70130
(504) 581-3838
Attorney for Petitioner.

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APPENDIX A

[FILED SEP 5 2003]

SUPREME COURT OF LOUISIANA

NO. 02-B-3251

c/w

NO. 02-B-3252

IN RE: DONALD O. PINKSTON

ON APPLICATION FOR REHEARING

PER CURIAM

Respondent, Donald O. Pinkston, seeks rehearing from the judgment of this court permanently disbarring him from the practice of law. Essentially, respondent claims that he was denied procedural due process because the Office of Disciplinary Counsel did not give him notice, either in its formal charges or written briefs, that permanent disbarment could be imposed in his case.[1]

The essence of procedural due process is that "notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defense." *In re: Ruffalo*, 390 U.S. 544, 550 (1968) (quoting *Ran-*

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[1] Respondent also argues he was deprived of substantive due process and application of the permanent disbarment rules to his conduct would violate the prohibition against ex post facto laws. Nearly identical arguments were discussed and rejected in this court's recent opinion in *In re: Laudumiey and Mann*, 03-0234 (La. 6/27/03), ___So.2d ___.

dall v. Brigham, 7 Wall. 523 (1868)). It is undisputed that respondent had full notice of the charges against him. He participated in the formal hearing before the hearing committee and presented mitigating evidence. He was clearly aware that the charges against him were serious, as demonstrated by the fact that both the hearing committee and disciplinary board recommended disbarment.

Respondent filed an objection in this court to the recommendation of disbarment, filed a written brief and participated in oral argument. The thrust of respondent's argument in this court was that his misconduct was not serious enough to warrant disbarment. Clearly, respondent's position that he should not be disbarred necessarily encompassed the argument that he should not be permanently disbarred. As this court has recognized, permanent disbarment does not represent a new sanction which did not previously exist; rather, it is simply a procedural change to the rule which recognizes a power the court has always possessed. *See In re: Laudumiey and Mann,* 03-0234 (La. 6/27/03), at p. 10, ___ So.2d ___ ("[t]hus, it is clear the amendments to Supreme Court Rule XIX, § 10(A) and § 24(A) do not represent a substantive change to the bar disciplinary rules, nor do they result in the adoption of a new sanction which did not previously exist. Rather, these amendments simply represent a procedural change to Supreme Court Rule XIX in order to recognize a power this court has always possessed"). Therefore, we find respondent received adequate procedural due process protection.

Accordingly, the application for rehearing is denied.

APPENDIX B

[Filed JUN 2 2003]

IN THE SUPREME COURT
OF THE STATE OF LOUISIANA

NO. 02-B-3251
c/w
NO. 02-B-3252

IN RE: DONALD O. PINKSTON,
ATTORNEY DISCIPLINARY PROCEEDINGS

DONALD O. PINKSTON'S
PETITION FOR REHEARING

COMES NOW Donald O. Pinkston, respondent in the above entitled and numbered proceedings who, pursuant to Rule IX of the Supreme Court Rules, respectfully petitions this Honorable Court for a hearing in this matter. As grounds for this hearing, respondent shows that the May 20, 2003 *per curiam* opinion of this Court, which permanently disbarred him from the practice of law in the State of Louisiana, violates respondent's right to procedural due process of law under Article I, §2 of the Louisiana Constitution (1974) and the Fourteenth Amendment to the United States Constitution; it violates respondent's right to substantive due process of law under Article I, §2 of the Louisiana Constitution (1974)

and the Fourteenth Amendment to the United States Constitution; it violates respondent's right to substantive due process of law under Article I, §2 of the Louisiana Constitution (1974) and the Fourteenth Amendment to the United States Constitution; and it violates Article I, §23 of the Louisiana Constitution (1974) and Article I, Section 9, cl. 3 of the United States Constitution, in that it constitutes an *ex post facto* application of the laws of the State of Louisiana.[1] In further support of this petition for rehearing, respondent shows:

1. On April 21, 1999, the Office of Disciplinary Counsel filed formal charges in proceedings #99-DB-029, described as the "Small matter" in the Court's opinion. As can be seen from the face of those pleadings, and as is set forth in this Court's opinion, all of the respondent's conduct in the Small matter occurred prior to December 31, 1998.

2. On June 12, 2000,[2] the Office of Disciplinary Counsel filed formal charges in proceedings #00-DB-073, described as the "McDonald, Isaac, Alston, Jones and Motton matters" in the Court's opinion. As can be seen from the face of those pleadings, and as is set forth in this Court's opinion, all of respondent's conduct in the McDonald, Isaac, Alston, Jones and Motton matters occurred prior to December 31, 1999.

3. Because hearings were conducted in both proceedings,[3] pre-and post-hearing memoranda were submitted

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[1]The sanction of permanent disbarment was added to Rule XIX, Section 10, by order of this Court dated July 19, 2001, effective August 1, 2001.

[2]The Court's opinion of May 20, 2003, erroneously gives the filing date for this second set of charges as May, 2001. *See Court's Opinion*, p. 7.

[3]The two proceedings have never been formally consolidated, although the Disciplinary Board issued only one opinion, addressing both proceedings.

by the parties in each instance. Significantly, in the pre-hearing memorandum submitted by the Office of Disciplinary Counsel in proceedings #99-DB-029, counsel stated that the appropriate sanction was "disbarment." The sanction of permanent disbarment was neither raised, nor sought.

In the post-hearing memorandum submitted by the Office of Disciplinary Counsel on January 22nd, 2001, in the same proceedings, counsel stated: "In keeping with the stipulation of counsel for Pinkston, disbarment is the only appropriate remedy."[4] Again, the sanction of permanent disbarment was not raised, or sought.

4. In the pre-hearing memorandum submitted by the Office of Disciplinary Counsel on August 29, 2000, in proceedings #00-DB-073, counsel stated: "Disciplinary Counsel suggests that the appropriate sanction is a lengthy suspension."

In the post-hearing memorandum submitted by the Office of Disciplinary Counsel on November 30, 2000, in these same proceedings, counsel stated: "Disciplinary Counsel suggests that Respondent should be suspended for a lengthy period of time. Considering the multiple cases of misconduct and all the aggravating factors, a lengthy suspension is appropriate to protect the public."

5. On March 7, 20001, Hearing Committee No. #24 issued its "Findings and Recommendation" in proceedings #00-DB-073, in which the Committee stated: "It is the Committee's recommendation that Respondent be

---

[4]In his pre-hearing memorandum, counsel for Pinkston had stated as follows: "The appropriate sanction for the charges brought by the Office of Disciplinary Counsel is disbarment, if the charges are proven by clear and convincing evidence. *See In Re: Ronald A. Welcker*, 753 So.2d 177 (La. 2000)."

suspended from the practice of law for thirty (30) months and be required to file a petition for reinstatement."

6. On May 8, 2001, Hearing Committee No. #24 issued its "Findings and Recommendation" in proceedings #99-DB-029, in which the Committee stated: "It is the Committee's recommendation that Respondent be disbarred and that he be assessed all costs of these proceedings." Again, the sanction of permanent disbarment was not mentioned.

7. Thereafter, arguments were held before the Louisiana Attorney Disciplinary Board on March 28, 2002. Although the transcript of those arguments has not been made part of the record of these proceedings, undersigned counsel avers that the sanction of permanent disbarment was neither sought, nor even mentioned by the Office of Disciplinary Counsel.

8. On December 30, 2002 the Disciplinary Board recommended that respondent be disbarred. Significantly, at no place in its recommendation does the Disciplinary Board recommend the sanction of permanent disbarment, or even suggest that it was available as a sanction.

9. On April 4, 2003, the Office of Disciplinary Counsel filed its brief in the instant proceeding. With regard to proceedings 99-DB-029, Disciplinary Counsel wrote: "It is respectfully submitted that both the hearing committee and the Disciplinary Board were correct and that the respondent be disbarred from the practice of law and cast with all costs associated with these proceedings."

(ODC Brief, p.13).[5] With regard to proceedings 00-DB-073, Disciplinary Counsel wrote: "Therefore, based on the foregoing reasons, it is respectfully submitted that the Board's recommendation of disbarment is appropriate to protect the public as well as the profession." (ODC Brief, p.20). In sum, As of April 4, 2003, the sanction of permanent disbarment was not being sought by the Office of Disciplinary Counsel.

10. Thereafter, oral argument was held in this matter. Undersigned counsel avers on information and belief that at argument, counsel for the Office of Disciplinary Counsel contended, **for the first time**, that the sanction of permanent disbarment was not only available, but appropriate.[6]

11. On May 20, 2003, this Honorable Court issued its *per curiam* opinion in these proceedings, in which it imposed the sanction of permanent disbarment upon respondent. In doing so, the Court wrote:

> * * *Nonetheless, we find respondent's conduct in the Small matter is so egregious that ordinary disbarment would be inappropriate. According, we now turn to a discussion of permanent disbarment.
>
> The sanction of permanent disbarment is set forth in the 2001 amendment to Supreme Court Rule XIX, §10, and §24 (footnotes omitted). In our commentary accompanying the amendment, we stated in pertinent part:
>
> In the public interest, the Court has amended Louisiana Supreme Court Rule XIX to codify

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[5]Significantly, in its brief, the Office of Disciplinary Counsel mentions the existence of the sanction (ODC Brief, p. 13), but does not suggest that it is appropriate.

[6]Respondent Donald O. Pinkston was acting *pro se* in all previous proceedings before this Court, including oral argument.

> Permanent Disbarment as an available sanction for attorney misconduct. While the Court has always had the discretion to deny an application for readmission after the requisite five (5)-year waiting period after disbarment, an attorney who is permanently disbarred under these circumstances will be prohibited from applying for readmission to the bar. These amendments reflect the judgment of the Court that in some instances lawyer misconduct may be so egregious as to warrant a sanction of permanent disbarment based on the facts of an individual case and in consideration of the guidelines in Appendix E to the Rules of Lawyer Disciplinary Enforcement.

In Appendix E, we set forth several guidelines illustrating the type of cases which might warrant permanent disbarment. We explained that these guidelines were not intended to bind this court in its decisionmaking, but to provide "useful information to the public and to lawyers concerning the types of conduct the Court might consider to be worthy of permanent disbarment."

Guideline 2 of Appendix E provides that an attorney's "[i]ntentional corruption of the judicial process" is a ground for permanent disbarment. Clearly, respondent's actions in the Small matter must be considered an intentional corruption of the judicial process.

As recently noted in *In re: Morphis,* 01-2803 (La. 12/4/02), ___ So.2d ___ , we do not impose the sanction of permanent disbarment lightly. Nonetheless, we are firmly convinced that we would be remiss in our constitutional duty to regulate the practice of law if we did not impose that sanction here. By making false representations and concealing facts, respondent subverted the judicial process to his own ends. He engaged in conduct that was

> calculated to frustrate the administration of justice. This court cannot and will not condone such conduct by an attorney when high standards of honesty are expected. *See Louisiana State Bar Ass'n v. Haylon,* 250 La. 651, 198 So.2d 391, 392 (1967). Respondent's actions convincingly demonstrate that he does not possess the requisite moral fitness to practice law in this state. He must be permanently disbarred (Footnote omitted).
>
> Accordingly, we will permanently disbar respondent from the practice of law in the State of Louisiana.

(Court's Opinion, pp. 14-15).

12. As specified above, and as is more fully explained below, the imposition of the sanction of permanent disbarment, without notice that the Court considered this sanction to be available, without the opportunity to brief, or fully argue the availability or applicability of the sanction, and without a judicial determination of whether it is legal to impose a sanction that did not exist at the time of the conduct with which respondent was charged, violates several of respondent's constitutional rights.

The procedural due process issue

13. It is beyond dispute that the protections afforded by the due process clauses of the Louisiana and United States Constitutions apply to lawyer disciplinary proceedings. *See, e.g., In re Ruffalo,* 390 U.S. 544, 88 S.Ct. 1222 (1968); *In the matter of Sealed Appellant,* 194 F.3d 666 (5th Cir. 1999); and *Louisiana State Bar Association v. McGovern,* 481 So.2d 574 (La. 1986). Such due process necessarily includes both procedural due process, and substantive due process.

At its most fundamental level, procedural due process includes the right to notice, and the opportunity to be heard, and to defend against the charges or allegations. *LSBA v. McGovern, supra.* The notice component of procedural due process comprises not only notices of the *charges,* but also notice of the *punishment* that might be imposed, particularly when a range of possible punishments exists. *See Lankford v. Idaho,* 500 U.S. 107, 111 S.Ct. 1723 (1991); and *BMW of North America, Inc., v. Gore,* 517 U.S. 559, 116 S.Ct. 1589, 1598 (1996) - "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose" (footnote omitted).

The record in this proceeding is perfectly clear: respondent Donald Pinkston had no notice whatsoever, until the "middle" of oral argument, that the sanction or punishment of permanent disbarment was "available" and being sought by the Office of Disciplinary Counsel. This was, and is constitutionally inadequate notice. Rehearing in this matter should be granted to modify the sanction imposed upon respondent to disbarment, with the right to petition for readmission.

The substantive due process issue

14. As cited above, the respondent in a lawyer disciplinary proceeding also has the right to substantive due process. While this right is intertwined with the right to procedural due process, it has aspects that go beyond it – such as the right to have constitutional claims heard in the disciplinary proceeding. *Middlesex County Ethics Committee v. Garden State Bar Ass'n,* 457 U.S. 423, 102 S.Ct. 2515 (1982). Because of the procedure that

was used in this case, respondent was denied all opportunity to argue that the application of the sanction of permanent disbarment violated the *ex post facto* clauses of the Louisiana and United States Constitution. (*See infra*).

Moreover, on a more basic level, respondent was denied the right to conduct his defense, and to make decisions based upon the possibility of this sanction, and was denied the right to present evidence bearing on the sanction itself. The congruence between this proceeding and the capital proceeding described in *Lankford v. Idaho, supra,* is nearly perfect, and the result should be the same: the sanction imposed should be vacated.

The ex-post facto issue

15. The record in this matter demonstrates that all the conduct in question occurred, and all the formal charges were filed long before August 1, 2001, the date upon which this Court's amendment to Rule XIX, Section 10, took effect. Thus, this case squarely presents the question that was also squarely presented in *In re Parker,* 815 So.2d 794 (La. 2002), *In re Gros,* 815 So.2d 799 (La. 2002), and *In re Patrick,* 815 So.2d 804 (La. 2002): whether the permanent disbarment rules can "operate retroactively because to do so would deprive the respondent-attorney of the right to seek readmission, a right granted to him at the time of the underlying misconduct." *Parker, supra,* pp. 797-798.

The Court did not resolve the question in *Parker*:

> Having considered the record of the instant proceeding in light of the well-presented arguments of the amici and the ODC, we now conclude that we need not resolve the issue of retroactivity of the

> permanent disbarment rules in the context of the present facts.

Parker, supra, p. 798.

To the contrary, the Court expressly reversed it:

> Our decision should not be interpreted as espousing the position advanced by the amici in this case that the date of the misconduct determines whether the permanent disbarment rules should be applied. As noted above, we expressly decline to resolve that issue, and nothing in this opinion should be interpreted as passing on whether we could or could not impose permanent disbarment under these facts.

Parker, supra, p. 798, fn. 7.

Research does not disclose any subsequent case in which the Court has addressed the retroactivity question, although it appears that the Court has been imposing the sanction of permanent disbarment even when the misconduct occurred prior to August 1, 2001. *See, e.g., In re Condoll,* 840 So.2d 502 (La. 2003); *In re Morphis,* 831 So.2d 934 (La. 2002); *In re Elbert,* 840 So.2d 494 (2002), and *In re Hilburn,* 840 So.2d 471 (La. 2002). To put the matter concisely, it appears as though the Court has decided the retroactivity question without addressing it directly, and has decided it in a way that permits the retroactive application of the rule.

This is plain constitutional error. Under any number of U.S. Supreme Court decisions, *see, e.g., Miller v. Florida,* 482 U.S. 423, 107 S.Ct. 2446 (1987), and any number of decisions of this Court, *see, e.g., State v. Loyd,* 689 So.2d 1321 (La. 1997), the retroactive application of any increased penalty violates the ex post facto clauses of the U.S. and Louisiana Constitutions.[7] Given that the

---

[7] Although lawyer disciplinary proceedings are only "quasi-criminal" in nature, there should be little doubt that the prohibi-

[footnote continued]

penalty of permanent disbarment is manifestly a more severe penalty that disbarment with the right to apply for readmission, with its concomitant possibility of readmission, the opinion in this matter should be vacated.

CONCLUSION

Wherefore, respondent Donald O. Pinkston respectfully moves this Court for the entry of an order granting rehearing in this matter, and thereafter, for the entry of an order vacating the sanction of permanent disbarment, and imposing the sanction of disbarment, with the right to apply for readmission after five (5) years.

Respectfully submitted, this 2nd day of June, 2003.

/s/ Herbert V. Larson, Jr.
HERBERT V. LARSON, JR.
700 Camp Street
New Orleans, Louisiana 70130
(504) 528-9500
Louisiana Bar No. 8052

Attorney for Respondent
Donald O. Pinkston

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tion against ex post facto laws is applicable to the penalties imposed in such proceedings. Moreover, even if such proceedings are treated as purely civil in nature, Article 6 of the Louisiana Civil Code would require the *prospective* application of the amendment permitting permament disbarment.

APPENDIX C

SUPREME COURT OF LOUISIANA

IN RE: DONALD O. PINKSTON

DOCKET NO: 2002-B-3251
C/W 2002-B-3252

RESPONSE BY
THE OFFICE OF DISCIPLINARY COUNSEL TO
THE RESPONDENT'S PETITION FOR REHEARING

LOUISIANA ATTORNEY DISCIPLINARY BOARD
DOCKET NO: 99-DB-029

OFFICE OF DISCIPLINARY COUNSEL

CHARLES B. PLATTSMIER, #11021
Chief Disciplinary Counsel
4000 S. Sherwood Forest Boulevard
Suite 607
Baton Rouge, Louisiana 70816
(225) 293-3900

SUPREME COURT OF LOUISIANA

IN RE: DONALD O. PINKSTON
(Bar Roll No: 17429)

DOCKET NUMBER: 2002-B-3251
c/w 2002-B-3252

RESPONSE BY
THE OFFICE OF DISCIPLINARY COUNSEL TO
THE RESPONDENT'S
PETITION FOR REHEARING

MAY IT PLEASE THE COURT:

PROCEDURAL HISTORY

The first set of formal charges filed against the Respondent which involved the Dwayne Small matter were filed in April, 1999. The disciplinary hearing on those formal charges was held on December 14, 2000. In his pre-hearing memorandum, the Respondent indicated that he would not be calling any witnesses to testify at the hearing and acknowledged that **disbarment would be the only appropriate sanction** if the charges were proven by clear and convincing evidence.

In May, 2001, the Hearing Committee issued its recommendation finding that all of the allegations of fact set forth by the Office of Disciplinary Counsel had been proven by clear and convincing evidence. The Hearing Committee recommended that the Respondent be dis-

barred. The matter was scheduled for board panel argument thereafter.

While this matter was pending both before the Hearing Committee and the Disciplinary Board, the Louisiana State Bar Association through its House of Delegates voted to recommend to the Louisiana Supreme Court that it amend its rules to expressly provide for the sanction of "permanent disbarment". Subsequent thereto, a Supreme Court committee was organized to evaluate the LSBA recommendation and report back to the Court. Thereafter, and effective August 1, 2001, the Louisiana Supreme Court amended sections of Rule XIX to expressly provide for its pre-existing authority to permanently disbar an attorney from the practice of law. Hence, the Supreme Court's order came after the Hearing Committee recommendation, but long before the Disciplinary Board panel arguments in these proceedings.

On December 30, 2002, the Disciplinary Board rendered its recommendations to the Louisiana Supreme Court once again recommending that the Respondent be disbarred from the practice of law. Shortly after the Disciplinary Board's recommendations were lodged with this Court, the Respondent filed an objection to the Board's recommendation and the matter was scheduled for briefing and argument.

The Respondent chose to represent himself before the Court during oral argument. During the course of oral argument, the Office of Disciplinary Counsel was specifically asked by a member of the Court whether or not the type of misconduct engaged in by the Respondent (particularly the Small matter) would meet the criteria for consideration of permanent disbarment. In response to the Supreme Court members' questions, the Office of Disciplinary Counsel asserted that the Respondent's

action certainly appeared consistent with Guideline 2 found in Appendix E to Rule XIX, "Intentional Corruption of the Judicial Process".

In due course, this Honorable Court issued its decision permanently disbarring the Respondent from the practice of law. On June 2, 2003, the Respondent, Donald O. Pinkston asked for a rehearing on the issue of sanction.

LAW AND ARGUMENT

The Respondent's request for rehearing appears to have been filed on or about June 2, 2003 and prior to this Court's decision in the consolidated cases of *In Re: Laudumiey* and *In Re: Mann* decided on June 27, 2003. The decision in that consolidated disciplinary matter, coupled with the Court's prior decision in the matter of *In Re: Nicholas Morphis,* appears to be dispositive of most if not all of the objections raised by the Respondent.

The Respondent's request for rehearing asserts that permanently disbarring him from the practice of law falls outside the authority of this Court because the conduct for which he stands assused took place before the effective date of the amendment to Rule XIX; that he did not receive notice of the Office of Disciplinary Counsel's intent to seek permanent disbarment prior to the Court's final decision; and that application of the amendments to Rule XIX which provided for permanent disbarment amount ot an *ex post facto* law.

At the outset it is important for this Court to recall what the Office of Disciplinary Counsel believes to be an important factor. **Donald Pinkston chose not testify in his own disciplinary hearing; Donald Pinkston chose not to call a single witness in his defense nor in mitigation.**

Indeed, Donald Pinkston conceded prior to his disciplinary hearing that if the Office of Disciplinary Counsel was able to carry its burden by clear and convincing evidence, he deserved to be disbarred. Now that the sanction of permanent disbarment has been visited upon him, Mr. Pinkston claims that he might well have presented a defense or perhaps mitigation had he known that the disbarment that he faced was a permanent one rather than one which would afford him an opportunity to apply for readmission. Most respectfully it is suggested that the argument is entirely unpersuasive.

It strains one's sense of reason to believe that had Mr. Pinkston a defense to the formal charges he would not have produced it at a hearing where admittedly the Office of Disciplinary Counsel was seeking disbarment. Indeed, even if Donald Pinkston were not in a position to contest the underlying factual allegations against him, one would certainly have expected Mr. Pinkston to have presented some form of mitigation, anything. In this instance, he did neither. It hardly gains Mr. Pinkston any credibility to now suggest, after the fact, that if only he had known permanent disbarment was option he would have defended himself and presented evidence in mitigation. Having presented those opportunities, he chose not to do so. He should not now be allowed to profit from a tactical decision which he apparently now regrets.

In the matter of *In Re: Nicholas Morphis,* 831 So.2d 934 (La. 2002), the Respondent was interimly suspended by the Supreme Court following an Office of Disciplinary Counsel request that he be suspended to protect the public. See *In Re: Morphis,* 701 So.2d 1324 (La. 1997). Formal charges were filed against Morphis in 1999 and a hearing committee later recommended that the Respond-

ent be disbarred from the practice of law. The Disciplinary Board concurred in the hearing committee's recommendation and urged that the respondent be disbarred and ordered to make payment of full restitution to all of his victims. The Supreme Court received the Disciplinary Board's recommendation on October 18, 2001, nearly 2½ momths after it amended Louisiana Supreme Court Rule XIX to expressly provide for permanent disbarment. When neither the Respondent nor the Office of Disciplinary Counsel objected to the Disciplinary Board's recommendation of disbarment, the Court on its own motion ordered the case docketed for oral argument and the parties were directed to address whether the sanction of permanent disbarment was appropriate.

After receiving briefs and argument, the Court rendered its decision wherein it once again recognized that a disbarred attorney has no absolute right to seek readmission after the passage of five years, and under the Court's plenary constitutional authority to regulate the practice of law, the Court has on occasion extended the minimum period for readmission from disbarment. Noting that Morphis' conduct met at least one of the illustrative guidelines set forth in Appendix E to Rule XIX, the Supreme Court concluded that it would be remiss in its constitutional obligation to regulate the practice of law if permanent disbarment was not imposed against Morphis.

Later the issue was more directly presented to the Court in *Laudumiey* and *Mann*, 2003-B-0234 (6/27/-2003), 2003 WL 21480392 (La. 2003) decided by the Court on June 27, 2003. In deciding the so called retroactive application of "permanent disbarment" the Court specifically addressed whether or not the sanction of permanent disbarment" may be applied to conduct which occurred prior to the August 1, 2001 effective date of the relevant amendments. As the Supreme Court made clear,

August 1, 2001 effective date of the relevant amendments. As the Supreme Court made clear, the amendments of Supreme Court Rule XIX, Sections 10 and 24:

> ". . . do not redefine the respondent's conduct, which remains controlled by the Rules of Professional Conduct in effect at the time of their offense. However, respondents contend that the amendments have the effect of increasing the penalty they may receive for their misconduct.
>
> The fallacy in respondents' argument is that nothing in the amendments to Supreme Court Rule XIX, Sections 10 and 24 alter the penalties a lawyer may receive for professional misconduct. Both prior to and after the amendment, the most serious sanction a lawyer may receive under Rule XIX is the sanction of disbarment. The only change effected by the amendments relates to the ability of a disbarred attorney to seek readmission. However, respondents maintain that the elimination of this "right" to seek readmission exposes them to greater sanction than they could have received at the time of their misconduct.
>
> Respondents have pointed to no constitutional authority or jurisprudence from which this court would indicate a disbarred attorney has a "right" to seek readmission to the bar of this state. The five year minimum period for seeking readmission, as set forth in Supreme Court Rule XIX, Section 24, is a rule of procedure that does not vest any substantive right in the attorney. The procedural nature of the rule is illustrated by our decision in *In Re: White,* 00-2732 (La. 4/25/01), 791 So.2d 602, and *Louisiana State Bar Ass'n. vs. Krasnoff,* 502 So.2d 1018 (La. 1987), in which we held that the minimum period for applying for readmission may be extended

> or otherwise modified at our discretion. Thus, is clear that our rules create no substantive right to seek readmission."

Thereafter, the Supreme Court made clear in the *Laudumiey* and *Mann* decision that its amendments to Rule XIX, Sections 10 and 24 did not represent substantive changes to the substantive bar discipline rules nor did those changes result in the adoption of a new sanction which did not previously exist. The Court made clear, "Given this court's absolute discretion over readmission, it is beyond dispute that this court has always had the unfettered authority to refuse readmission to disbarred attorneys, including the right to do so on a permanent basis."

Finally, the Court concluded that the amendments to Supreme Court Rule XIX, Sections 10 and 24 did not create a new penalty. "Accordingly, we conclude there is no merit to Respondent's argument that these amendments constitute prohibited *ex post facto* laws."

THE NOTICE ISSUE

The single issue raised by the Respondent which arguably has not been explicitly addressed by this Court is what can best be described as the "notice issue". In essence, the Respondent suggests that notice of the sanction sought by the Office of Disciplinary Counsel or to be imposed by the Court is a fundamental part of due process which he has been denied. The Respondent's theory, while novel, is unavailing.

At the outset it is once again important to emphasize the timeline which has previously been set out hereinabove. Within ninety days of the Hearing Committee opinion and recommendation, this Court amended Rule

XIX, Section 10 and 24, and published Appendix E which included Guideline 2 listing as a potential consideration for permanent disbarment an attorney's corruption of the judicial process, the precise conduct found to have been engaged in by the Respondent in connection with the Dwayne Small matter. Further, it is undeniable that the Respondent acknowledged to both the Hearing Committee and the Board that if the factual allegations brought against him were proven by clear and convincing evidence that the appropriate sanction was disbarment. That he faced banishment from the practice of law must be (and has been) conceded by the Respondent. The Office of Disciplinary Counsel has always sought Respondent's disbarment; the Respondent acknowledged that disbarment is appropriate for proven misconduct as alleged; and the Supreme Court's order imposes disbarment. Clearly, the Respondent had notice from the outset and throughout these proceedings that he faced disbarment.

The sole issue is whether the Respondent was entitled to a formal statement from either the Office of Disciplinary Counsel or the Court that his discipline might include a permanent ban on his filing an application for readmission. Clearly, he is not.

The Respondent does not now, not has he ever suggested that the formal charges failed to put him on notice of the facts and conduct that he has been accused of engaging in. Nor does the Respondent suggest that he was not fairly informed of the nature of the charges against him to permit him to prepare a defense. Lastly, the Respondent does not (nor could he) suggest that the substantive rules violated were not fully in force and in effect at the time his actions occurred.

In the matter of *In Re: Ruffalo,* 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed. 2nd 117 (1968), the United States Supreme Court concluded that under the due process clause, a finding of misconduct cannot be predicated upon evidence introduced at a disciplinary hearing if the lawyer had no prior notice of the charge. The formal charges need not even specify the precise rule of professional conduct that is alleged to have been violated. *Phelps vs. Kansas Supreme Court,* 662 F.2d 649 (10th Cir. 1981).

The Office of Disciplinary Counsel was able to locate no case law which would suggest that notice of the sanction to be imposed in a lawyer disciplinary hearing matter rises to the level of protections afforded under the due process clause. Indeed, at least one case with some striking similarities appears to hold to the contrary.

In the case of *Dixon vs. State Bar of California,* 32 Cal.3rd 728, 653 P.2d 321, 187 Cal. Rptr. 30 (Cal. 1982), the respondent claimed that prior to the hearing of his disciplinary case, he had not been advised by the California Bar Counsel of the discipline being sought. The Supreme Court of California held that notice was required only of the charges against him, not the sanction being sought. In what the California Court seemed to suggest was the most serious count of misconduct, the respondent:

> ". . . knowingly filed false statements with the court, seeking to deceive the judge with regard to the client's financial condition;"

The similarities to the case at bar are indeed striking.

This Court has held for decades that it has the sole and exclusive jurisdiction, authority and discretion to regulate the practice of law including the discipline to be imposed,

and whether to permit reinstatement or readmission. Neither the recommendation of hearing committees or the Disciplinary Board nor the suggestion by the Office of Disciplinary Counsel of the type of sanction sought, are in any way binding upon the Court. Indeed, little would be gained by trying to catalog the numerous cases where the Court has imposed discipline (both more onerous and less so) than that recommended or sought by the Office of Disciplinary Counsel.

Nothing in Supreme Court Rule XIX or in the jurisprudence of this state suggests or supports that a respondent must receive notice of the severity of sanction sought to be imposed. Every lawyer must be held to know that a violation of the Rules of Professional Conduct holds the potential for the imposition of sanctions including an expulsion from the profession. Nothing more or less has occurred in this case.

The true crux of the Respondent's argument lies in his assertion that he had no notice that the Court's decision might preclude his ability to file an application for readmission at some later date. This Court's decision in the case of *Laudumiey* and *Mann* slams shut the basic underpinnings of the Respondent's theory in that regard.

Once again, the Court in those cases made clear in unequivocal language, that Louisiana has never created a "substantive right" to seek readmission. Therefore, elimination of the procedural ability to file an application for readmission did not and could not deprive the Respondent of a "substantive right" which this Court has held does not exist.

With or without this Court's amendment to Rule XIX, the Respondent knew or certainly should have known that, "given this court's absolute discretion over readmission, it is beyond dispute that this court has always

had the unfettered authority to refuse readmission to disbarred attorneys, including the right to do so on a permanent basis."

In essence, the Respondent now seeks an extension of his opportunity to brief and orally argue his sanction. Clearly, predicated upon the questions which were posed to both the Office of Disciplinary Counsel and the Respondent during oral argument, Donald O. Pinkston was given the opportunity to request a sanction which would have left open for him the opportunity to file for readmission at a later date. Given the often conflicting and often incredulous statements made by the Respondent to the Court during oral argument, it is not surprising that this Court was neither moved nor persuaded by his pleas. His lack of success should not form a basis for this Court's grant of rehearing.

CONCLUSION

The Respondent Donald Pinkston was ordered permanently disbarred by a unanimous Court opinion issued May 20, 2003. On June 2, 2003, Mr. Pinkston sought a rehearing on several grounds, most of which were the subject of a subsequent decision by this Court in the matter of *Laudumiey* and *Mann*. It is respectfully submitted that the constitutional arguments advanced by the Respondent, having previously been addressed by the Supreme Court, form an insufficient basis for the Respondent's request for rehearing. Additionally, the Respondent should not now be heard to complain about the penalty which has been imposed upon him when he was provided with every opportunity to testify and present factual evidence in opposition to the formal charges and/or in mitigation. Mr. Pinkston should not today be permitted to profit for a tactical decision which he made prior to

his disciplinary hearing. The Respondent's request for rehearing should be denied.

Respectfully submitted,

OFFICE OF DISCIPLINARY COUNSEL

BY: /s/ Charles B. Plattsmier
CHARLES B. PLATTSMIER, #11021
Chief Disciplinary Counsel
4000 S. Sherwood Forest Boulevard, Suite 607
Baton Rouge, Louisiana 70816
(225) 293-3900

[Certificate of Service Omitted in Printing]

APPENDIX D

[Filed MAY 20 2003]

SUPREME COURT OF LOUISIANA

NO. 02-B-3251

c/w

NO. 02-B-3252

IN RE: DONALD O. PINKSTON

ATTORNEY DISCIPLINARY PROCEEDINGS

PER CURIAM

This disciplinary proceeding involves six counts of misconduct[1] stemming from two sets of formal charges filed by the Office of Disciplinary Counsel ("ODC") against respondent, Donald O. Pinkston, an attorney licensed to practice law in Louisiana but currently suspended from the practice of law for conduct unrelated to the instant proceedings.

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[1] The matter originally involved a total of eight counts. Two of the counts were dismissed by the hearing committee, based on a finding that the ODC failed to prove these charges by clear and convincing evidence. The ODC has not objected to this finding; accordingly, these counts will not be addressed further.

UNDERLYING FACTS

Small Matter

In 1993, Dwayne Small, respondent's stepson, pled guilty to manslaughter pursuant to a plea agreement in Orleans Parish Criminal District Court, Section "C." Mr. Small was sentenced to twenty-one years in prison and began serving his sentence. In 1995, respondent enrolled as counsel of record for Mr. Small and filed a Motion to Correct an Excessive Sentence alleging the court erred in failing to apply the sentencing guidelines to Mr. Small's plea agreement, which when applied would warrant imposition of a shorter sentence. The district attorney's office filed an objection to respondent's motion urging it was illegal to amend a sentence imposed at hard labor after a criminal defendant started serving his time. Additionally, he asserted there was no law mandating the application of sentencing guidelines to plea agreements.

At a hearing conducted on June 25, 1996 by Judge Ike Spears, who was sitting ad hoc in Section "C," respondent alleged on numerous occasions that he had personally spoken with the district attorney and was assured the State of Louisiana would not object to his motion. Based on respondent's representations, Judge Spears reduced Mr. Small's sentence from twenty-one years to twelve years, but stayed the effect of the order to enable the State to file writs.

Days later, the district attorney's office filed a motion seeking reconsideration of the sentence reduction. Judge Spears kept the stay in place and again continued hearings of the State's motion to permit respondent an opportunity to confirm his purported agreement with the district attorney's office. When respondent was unable to

do so, Judge Spears granted the State's motion to reconsider and reinstated Mr. Small's original twenty-one year sentence.

Prior to a scheduled status conference, Judge Sharon Hunter was elected to fill the vacancy in Section "C," and the matter passed to her. In November 1996, she held the status conference and determined the matter was closed. The docket entry reflected: "the status hearing considered held and satisfied."

Thereafter, respondent filed a "Motion to Correct an Illegal Minute Entry" in Mr. Small's case. For unexplained reasons, that motion appeared on the docket of Section "G," Presided over by Judge Julian Parker.[2] At the hearing on the motion, respondent represented to Judge Parker that an administrative error had taken place since Judge Spears had imposed a twelve-year sentence on Mr. Small when the actual sentence should have been nine years. Based on the representations made by respondent, Judge Parker vacated the prior sentence and resentenced Mr. Small to nine years.[3] As a result, Mr.

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[2]In a subsequent hearing, respondent stated the case was remanded to Section "G" by Judge Hunter who recused herself from the matter. However, at another hearing, respondent professed to be unaware as to why the case appeared on the docket in Section "G." He stated: "Your Honor, I have no idea. I have no connections with this building. I have no connections with Judge Hunter. I have no connections with the court. All I know is that the case was on the docket, I received a subpoena, I showed up." Later, in oral argument before this court, respondent indicated that he had not received a subpoena in the case, but was in Section "G" on an unrelated matter when the case was called.

[3]Judge Parker was apparently unaware of Judge Spears' earlier judgment reinstating the original sentence of twenty-one years. In subsequent appellate proceedings, Judge Parker explained the minute entry reflecting Judge Spears' reversal of the June 25, 1996 ruling and reinstating the sentence of twenty-one years was "missing" from the record when he acted on the case.

Small was entitled to an immediate release from prison.

Subsequently, Judge Parker reviewed the complete record and learned Judge Spears had in fact reinstated the twenty-one year sentence. Judge Parker advised the parties it was not his intent to re-sentence Mr. Small; rather, he believed, based on what he characterized as "erroneous and misleading representations" from respondent, that he was merely correcting an administrative error of Judge Spears. Accordingly, Judge Parker rescinded his earlier ruling and reinstated Mr. Small's original sentence of twenty-one years. He ordered respondent to turn Mr. Small back into the custody of the State of Louisiana.

The ODC later conducted an investigation into respondent's activity in the Small matter.

McDonald Matter

In May 1996, Kenneth McDonald retained respondent for $3,500 to assist him in his criminal matter pending in the United States District Court for Eastern District of Louisiana. There was no written contract of employment between the parties. At the time, Mr. McDonald was already represented by New Orleans criminal defense attorney Frank DeSalvo. Nonetheless, Mr. McDonald wanted respondent to pursue the scheduling of an expeditious bond hearing and negotiate a plea agreement more favorable than that obtained by Mr. DeSalvo.

Subsequently, respondent met with Mr. McDonald on a few occasions and spoke on one or more times with the Assistant U.S. Attorney assigned to the case.[4] Ulti-

[4]Mr. DeSalvo wrote to the ODC that, to his knowledge, respondent had contacted on one occasion the U.S. Attorney, who advised that he would not discuss or negotiate the matter because respondent was not counsel of record. According to Mr. DeSalvo, respondent had essentially no part in the criminal matter.

mately, Mr. McDonald did not get a bond hearing and he pled guilty relative to an agreement negotiated by Mr. DeSalvo.

On February 28, 1997, Mr. McDonald filed a complaint with the ODC advising that respondent failed to take any action to pursue his legal matter and refused to return the unearned legal fee, despite repeated requests. Contrary to his testimony at the formal hearing, respondent denied he was retained as counsel in the matter since Mr. McDonald was already represented by Mr. DeSalvo. Later, respondent erroneously stated he was retained after Mr. McDonald had already pled guilty and that respondent's role was "would be to counsel and assist [Mr. McDonald] in calculating the guidelines and searching in the calculation and appealing his sentence if necessary."

Isaac Matter

In February 1997, Ammie McCrainey Isaac retained respondent for $5,000 to represent her son, Emanuel Isaac, in criminal appellate proceedings. Following a multiple bill hearing, Mr. Isaac was sentenced to twenty years for manslaughter. Respondent filed a timely notice of appeal. Almost one year and one-half after he was retained, respondent wrote to Ms. Isaac stating the appeal was filed on January 26, 1998. However, while the appeal record in the case was lodged with the court of appeal, the transcript of the hearing and sentencing on the multiple bill were not included. Finding these transcripts to be "essential" for appellate review, the court of appeal ordered respondent five times between January and May 1998 to "take necessary steps to have [the] transcript prepared and forwarded to the Clerk of this Court." After the record was ultimately supplemented,

the court of appeal had to order respondent on three occasions between June and November 1998 to file his assignments of error and brief. Although respondent was granted numerous extensions of time to submit such, he failed to timely comply with the court's orders. When respondent finally complied with the court's order on November 2, 1998, the brief relative to the appeal of the trial and sentencing in Mr. Isaac's homicide case consisted of one assignment of error in a three-page brief.

Subsequently, respondent was suspended from practice of law on unrelated charges in *In re: Pinkston,* 98-1926 (La. 12/1/98), 728 So.2d 381. As a result, Ms. Isaac retained other counsel, who filed a supplememental brief and completed the appellate representation. She asked that respondent provide an accounting and return the unearned fee, but he failed to do so.

Alston Matter

In early 1997, Felishia Alston, a California resident, filed a complaint against respondent alleging she retained respondent for $8,000 to represent Dalshawn Boson in criminal proceedings pending in Orleans Parish Criminal District Court. She contended respondent neglected the legal matter, failed to communicate with his client and withdrew from the representation prior to completing the matter, as well as refused to account for or return the unearned portionof the fee. Ultimately, the parties submitted to alternative fee dispute arbitration through the Louisiana State Bar Association. On November 17, 1998, the appointed arbitrator rendered a written decision finding respondent incompetently and negligently handled the criminal matter, as well as failed to communicate with his client. She concluded respondent owed Ms. Alson $3,000 of the advanced fee. Subsequently, when

respondent neglected to pay any portion of the owed fee, Ms. Alston had to retain counsel to file a civil action against respondent. Ms. Alston obtained a judgment against respondent, but respondent failed to satisfy the judgment.

Jones Matter

On December 11, 1998, this court rendered an order in *In re: Pinkston*, 98-1926 (La. 12/11/98), 728 So.2d 381, suspending respondent from the practice of law for a period of two years. After this court denied respondent's application for rehearing (making the suspension a final judgment), respondent accepted payment of $1,000 from Hilda Jones for the criminal representation of her son. Subsequently, Ms. Jones learned of respondent's suspension from practice when he failed to appear for a court hearing in her son's case. Respondent refused to refund the fee until August 1999, when prompted by Ms. Jones' filing of a disciplinary complaint with the ODC.

Motton Matter

In 1995, Agnes Motton and Zina Nunnery retained respondent for $2,300 to represent Frank Motton in post-conviction criminal proceedings pending in Orleans Parish Criminal District Court. Mr. Motton had been convicted of first degree murder and sentenced to life in prison. Respondent filed an application for post-conviction relief raising a claim of newly-discovered evidence. According to court records, the matter was scheduled for an evidentiary hearing, but was rescheduled on three occasions for various reasons. After March 1996, respondent failed to take any action in the case, nor did he refund his unearned fee, despite repeated requests.

In January 1998, Ms. Motton and Ms. Nunnery filed a complaint with the ODC advising of respondent's neglect of a legal matter, failure to communicate and failure to return the unearned fee. While respondent filed a response denying any misconduct on his part, he conceded he neglected to complete the legal matter due to his suspension in *In re: Pinkston*, 98-1926 (La. 12/11/98), 798 So.2d 381, and agreed he owed a refund of some portion of the fee.

DISCIPLINARY PROCEEDINGS

Formal Charges

After investigation, the ODC filed two separate sets of formal charges against respondent. The first set, filed in April 1999, involved the Small matter and alleged violations of Rules 1.2(c) (counsel or encourage a client to engage in conduct that the lawyer knows is criminal or fraudulent), 3.3(a)(1) (false statement of material fact or law to a tribunal), 3.3(a)(2) (conceal that which attorney is required by law to reveal), 3.3(a)(4) (offer evidence known to be false), 8.4(a) (violating the Rules of Professional Conduct), 8.4(c) (engaging in conduct involving deceit, dishonesty, fraud, or misrepresentation) and 8.4(d) (engaging in conduct prejudicial to the administration of justice) of the Rules of Professional Conduct.

In May 2001, the ODC filed a second set of charges, involving the McDonald, Isaac, Alston, Jones and Motton matters. These charges alleged Rules 1.3 (lack of diligence), 1.4 (failure to communicate), 1.5 (failure to refund client funds), 1.15(b) (failure to promptly account for and deliver funds or property owed to a client or third party), 1.16(d) (failure to protect client interests upon termination of representation), 5.5(a) (unauthor-

ixed practice of law), 8.1(a) (knowingly make a false statement of material fact in connection with a disciplinary matter or bar admission matter or application), 8.4(a) (violating the Rules of Professional Conduct), 8.4(c) (engaging in conduct involving deceit, dishonesty, fraud, or misrepresentation) and 8.4(d) (engaging in conduct prejudicial to the administration of justice) of the Rules of Professional Conduct.

Respondent filed answers to both sets of formal charges. Separate hearings were conducted before different hearing committees.

Recommendations of the Hearing Committees

With regard to the Small matter, the hearing committee concluded respondent made several misrepresentations to Judge Parker, specifically, that Judge Hunter had recused herself, Judge Spears had reduced Mr. Small's sentence to twelve years when the twenty-one year sentence had been reinstated, and that the minute entry by Judge Spears was erroneous and should be corrected to further reduce Mr. Small's sentence to nine years. The hearing committee noted the misrepresentations resulted in the temporary release of Mr. Small from prison. Further, the committee found, while it was not clear whether respondent improperly caused the transfer to Judge Parker's section, respondent "nevertheless took advantage of it" to obtain the illegal release of his stepson.

Based on these conclusions, the hearing committee found respondent violated Rules 3.3(a)(1) (false statement of material fact or law to a tribunal), 3.3(a)(2) (conceal that which attorney is required by law to reveal), 3.3(a)(4) (offer evidence known to be false), 8.4(a) (violating the Rules of Professional Conduct), 8.4(c) (engaging in conduct involving deceit, dishon-

esty, fraud, or misrepresentation) and 8.4(d) (engaging in conduct prejudicial to the administration of justice) of the Rules of Professional Conduct.

The committee recognized respondent's cooperation in the disciplinary proceedings as a mitigating factor. As aggravating factors, the committee identified respondent's prior disciplinary record[5] and substantial experience in the practice of law. Applying these factors to the baseline sanction of disbarment, the committee concluded disbarment is appropriate under the facts.

A separate hearing committee heard the McDonald, Isaac, Alston, Jones and Motton matters. This committee found as follows:

In the McDonald matter, the committee concluded respondent violated Rule 1.5(f)(6) by failing to refund client funds, as he led Mr. McDonald to reasonably believe that, for $3,500 he would successfully obtain a bond hearing or favorable sentencing, which respondent failed to do.

In the Isaac matter, the committee found respondent failed to diligently pursue Mr. Isaac's appeal and failed to adequately communicate with his client, in violation of Rule 1.3.

In the Alston matter, the committee determined respondent engaged in conduct prejudicial to the adminis-

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[5] In *In re: Pinkston*, 98-1926 (La. 12/11/98), 728 So.2d 381, respondent was suspended from the practice of law for a period of two years for failure to maintain clients' funds in trust and failure to pay a third party medical provider over a period of several years. Respondent has not sought readmission. Additionally, respondent was admonished on four prior occasions between 1994 and 1995 for failing to respond to disciplinary complaints. Finally, in 1997, respondent was reprimanded for misleading clients, failing to return unearned fees and commingling of client funds.

tration of justice in violation of Rule 8.4(d) when he failed to satisfy his $3,000 obligation owed to Ms. Alston.

In the Jones matter, the committee concluded respondent violated Rule 1.5(f)(6) when he failed to refund the $1,000 retainer fee paid by Ms. Jones in connection with her son's criminal matter at the time he was suspended from the practice of law.

In the Motton matter, the committee found violations of Rules 1.3 (lack of diligence) and 1.5(f)(6) (failure to refund client funds) based on respondent's admission that there were several hearing continuances over a period of several years on Mr. Motton's writs for habeas corpus and that he did not earn the entirety of the fee paid. While the committee stated there was evidence that respondent did not fully communicate with his clients, the committee neglected to find a violation of Rules 1.4 (failure to communicate) and 1.16(d) (failure to protect client interests at termination of representation).

As aggravating factors, the committeed notes respondent's prior disciplinary record, pattern of misconduct and substantial experience in the practice of law. The sole mitigating factor was respondent's cooperation in the disciplinary proceedings. Applying these factors to the baseline sanction of suspension, the committee recommended a thirty-month suspension and payment of restitution to Mr. McDonald, Mr. Isaac, Ms. Alston, Ms. Motton and Ms. Nunnery.

Recommendation of the Disciplinary Board

With minor modifications, the disciplinary board accepted the factual findings of the hearing commit-

tees.[6] The board found respondent knowingly and intentionally violated duties owed to his clients, the public, the legal system and the profession. As to the Small matter, the board stated the actual injury to the legal system and the public was present in that respondent misrepresented the true status of Mr. Small's sentence to the court "and Mr. Small, a violent criminal, was released from prison years before his scheduled release date." As to the remaining client matters subject of the instant proceedings, the board stated actual injury resulted from respondent's neglect of legal matters, failure to provide accountings and return unearned fees to his clients.

The board adopted the mitigating and aggravating factors cited by the committees, as well as found respondent's substantial experience in the practice of law should have been considered as an aggravating factor. Finding respondent's actions show his lack of regard for his clients and for his professional obligations as a member of the bar, the board recommended that respondent be disbarred from the practice of law. It further ordered respondent to make restitution to his victims.

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[6]The board found minor errors regarding the committee's findings relative to the McDonald, Isaac and Motton matters. As to the McDonald matter, the board concluded the commmittee erred in failing to find a violation of Rule 8.4(a) (violating the Rules of Professional Conduct), although it admitted this finding added little, if anything, to the sanction imposed. As to the Isaac matter, the board determined the committee erred in finding violations of Rule 1.4 and 1.5(f)(6) since respondent was not charged with a violation of these rules, but found the committee erred in failing to find a violation of Rule 1.16(f) (failure to protect client interests at termination of representation) as respondent did not notify Ms. Isaac of his suspension, surrender her property and refund any unearned fees. Lastly, as to the Motton matter, the board pointed out that, although there was evidence respondent did not adequately communicate with his clients, the committee neglected to find a violation of Rule 1.4 (failure to communicate).

Respondent filed an objection to the disciplinary board's recommendation. Accordingly, the matter was docketed for briefing and argument in accordance with Supreme Court Rule XIX, §11(G).

DISCUSSION

Bar disciplinary matters come within the original jurisdiction of this court. La. Const. art. V, §5(B). Consequently, we act as triers of fact and conduct an independent review of the record to determine whether the alleged misconduct has been proven by clear and convincing evidence. *In re: Quaid,* 94-1316 (La. 11/30/94), 646 So.2d 343, 348; *Louisiana State Bar Ass'n v. Boutall,* 597 So.2d 444, 445 (La. 1992). While we are not bound in any way by the findings and recommendations of the hearing committee and disciplinary board, we have held the manifest error standard is applicable to the committee's factual findings. See *In re: Caulfield,* 96-1401 (La. 11/25/96), 683 So.2d 714; *In re: Pardue,* 93-2865 (La. 3/11/94), 633 So.2d 150.

The record supports the hearing committees' findings that the charges against respondent have been proven by clear and convincing evidence.

In the Small matter, the only logical conclusion to be drawn from the evidence is that respondent intentionally and deliberately misrepresented the facts to the court in an effort to obtain a more lenient sentence for Mr. Small. Respondent initially represented to Judge Spears that the district attorney's office had agreed not to oppose the motion to reduce Mr. Small's sentence, when in fact it should have been obvious to respondent that no such agreement had been made by the district attorney's office. Based on respondent's false representations,

Judge Spears reduced Mr. Small's sentence. After Judge Spears reinstated Mr. Small's sentence, the case mysteriously appeared on Judge Parker's docket in another section of court. Respondent has offered no cogent explanation of how the case ended up in that section. At one point, he indicated that the transfer was based on the recusal of a judge; at another time, he indicated the case simply appeared on the docket to his surprise, and he was fortuitously in that section of court at the time the case was called. In any event, respondent represented to Judge Parker that he was simply asking to correct an administrative error in a minute entry, which would result in Mr. Small being sentenced to nine years. At no time did respondent call Judge Parker's attention to the fact that Judge Spears had reinstated Mr. Small's sentence to twenty-one years. Based entirely on respondent's representations, which Judge Parker later characterized as "erroneous and misleading," Mr. Small's sentence was reduced to nine years, entitling him to an immediate release.

Although respondent adamantly asserts he had no improper motives in this matter, he offers no evidence in support of his contentions. Rather, he simply asks this court to disbelieve every witness who testified in these proceedings, including the trial judges and a representative of the district attorney's office, who were found to be credible by the hearng committee. We are not prepared to disregard to findings of fact made by the hearing committee. Accordingly, we find the charges in the Small matter are proven by clear and convincing evidence.

In the remaining matters, the record clearly demonstrates respondent neglected legal matters, failed to promptly provide accountings and failed to return un-

earned fees to his clients. The charges in these matters display a didturbingly similar scenario in which respondent collects fees for a criminal representation, neglects the matter and then refuses to refund his unearned fees.

Having found evidence of professional misconduct, the sole issue presented for our consideration is the appropriate sanction for respondent's actions. In determining a sanction, we are mindful that disciplinary proceedings are designed to maintain high standards of conduct, protect the public, preserve the integrity of the profession, and deter future misconduct. *Louisiana State Bar Ass'n v. Reis,* 513 So.2d 1173 (La. 1987). The discipline to be imposed depends upon the facts of each case and the seriousness of the offenses involved, considered in light of any aggravating and mitigating circumstances. *Louisiana State Bar Ass'n v. Whittington,* 459 So.2d 520 (La. 1984).

In the Small matter, respondent's conduct unquestionable violates Rule 3.3, in that he made false statements to a court and concealed evidence from the court which he should have revealed. Such practices "violate the most fundamental duty of an officer of the court." Commentary to Standard 6.11 of the *ABA Standards for Imposing Lawyer Sanctions.* As explained by Standard 6.11, the baseline sanction for violations of Rule 3.3 is disbarment. Nonetheless, we find respondent's conduct in the Small matter is so egregious that ordinary disbarment would be inappropriate. Accordingly, we now turn to a discussion of permanent disbarment.

The sanction of permanent disbarment is set forth in the 2001 amendment to Supreme Court Rule XIX,

§10[7] and §24.[8] In our commentary accompanying the amendment, we stated, in pertinent part:

> In the public interest, the Court has amended Louisiana Supreme Court Rule XIX to codify Permanent Disbarment as an available sanction for attorney misconduct. While the Court has always had the discretion to deny an application for readmission after the requisite five (5)-year waiting period after disbarment, an attorney who is permanently disbarred under these circumstances will be prohibited from applying for readmission to the bar. These amendments reflect the judgment of the Court that in some instances lawyer misconduct may be so egregious as to warrant a sanction of permanent disbarment based on the facts of an individual case and in

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[7] Supreme Court Rule XIX, §10(A) was amended to add the highlighted language:

> (1) Disbarment by the court. **In any order or judgment of the court in which a lawyer is disbarred, the court retains the discretion to permanently disbar the lawyer and permanently prohibit any such lawyer from being readmitted to the practice of law.**

[8] Supreme Court Rule XIX, §24(A) was amended to add the highlighted language:

> A disbarred lawyer or a suspended lawyer who has served a suspension period of more than one year, exclusive of any waivers or periods of deferral, shall be reinstated or readmitted only upon order of the court. . . . No lawyer may petition for readmission until five years after the effective date of disbarment. A lawyer who has been placed on interim suspension and is then disbarred for the same misconduct that was the ground for the interim suspension may petition for readmission at the expiration of five years from the time of the effective date of the interim suspension. **The court retains the discretion, in accordance with Section 10A of this rule, to permanently disbar a lawyer and permanently prohibit any such lawyer from being readmitted to the practice of law.**

consideration of the guidelines in Appendix E to the Rules of Lawyer Disciplinary Enforcement.

In Appendix E, we set forth several guidelines illustrating the type of cases which might warrant permanent disbarment. We explained that these guidelines were not intended to bind this court in its decisionmaking, but to provide "useful information to the public and to lawyers concerning the types of conduct the Court might consider to be worthy of permanent disbarment."

Guideline 2 of Appendix E provides that an attorney's "[i]ntentional corruption of the judicial process" is a ground for permanent disbarment. Clearly, respondent's actions in the Small matter must be considered an intentional corruption of the judicial process.

As recently noted in *In re: Morphis,* 01-2803 (La. 12/4/02), ___ So.2d ___, we do not impose the sanction of permanent disbarment lightly. Nonetheless, we are firmly convinced that we would be remiss in our constitutional duty to regulate the practice of law if we did not impose that sanction here. By making false representations and concealing facts, respondent subverted the judicial process to his own ends. He engaged in conduct that was calculated to frustrate the administration of justice. This court cannot and will not condone such conduct by an attorney when high standards of honesty are expected. *See Louisiana State Bar Ass'n v. Haylon,* 250 La. 651, 198 So.2d 391, 392 (1967). Respondent's actions convincingly demonstrate that he does not possess the requisite moral fitness to practice law in this state. He must be permanently disbarred.[9]

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[9]Having determined that respondent must be permanently disbarred for his conduct in the Small matter, we need not address the appropriate sanction for the other counts of misconduct, although respondent's actions in these matters only reinforces our view that he lacks the moral fitness to practice law.

Accordingly, we will permanently disbar respondent from the practice of law in the State of Louisiana.

DECREE

Upon review of the findings and recommendations of the hearing committees and disciplinary board, and considering the record, it is ordered that the name of Donald O. Pinkston, Louisiana Bar Roll No. 17429, be stricken from the roll of attorneys and that his license to practice law in the State of Louisiana be revoked. Pursuant to Supreme Court Rule XIX, §24(A), it is further ordered that respondent be permanently prohibited from being readmitted to the practice of law in this state. All costs and expenses in the matter are assessed against respondent in accordance with Supreme Court Rule XIX, §10.1, with legal interest to commence thirty days from the date of finality of this court's judgment until paid.

APPENDIX E

EXCERPTS FROM RULE XIX OF THE LOUISIANA SUPREME COURT RULES RELATIVE TO LAWYER DISCIPLINE AS THEY EXISTED PRIOR TO AUGUST 1, 2001

Section 1. Authority of the Court.

Under the authority of Article V, Section 5(A) and (B) of the Louisiana Constitutionof 1974 and the inherent power of this court, it is ordered that Article XV of the Articles of Incorporation of the Louisiana State Bar Association be vacated and repealed, and the following Rules for Lawyer Disciplinary Enforcement be and are hereby adopted.

* * *

Section 10. Sanctions.

A. Types of Sanctions. Misconduct shall be grounds for one or more of the following sanctions:

(1) Disbarment by the court.

* * *

Section 24. Reinstatement and Readmission

A. Generally. A disbarred lawyer or a suspended lawyer who has served a suspension period of more than one year, exclusive of any waivers or periods of deferral, shall be reinstated or readmitted only upon order of the court. No lawyer may petition for reinstatement until six months before the period of suspension has expired. No lawyer may petition for readmission until five years after the effective date of disbarment. A

lawyer who has been placed on interim suspension and is then disbarred for the same misconduct that was the ground for the interim suspension may petition for readmission at the expiration of five years from the time of the effective date of the interim suspension.

* * *

APPENDIX F

EXCERPTS FROM RULE XIX OF THE LOUISIANA SUPREME COURT RULES RELATIVE TO LAWYER DISCIPLINE AFTER AUGUST 1, 2001 WITH COMMENTARY

* * *

Section 1. Authority of the Court.

Under the authority of Article V, Section 5(a) and (B) of the Louisiana Constitution of 1974 and the inherent power of this court, it is ordered that Article XV of the Articles of Incorporation of the Louisiana State Bar Association be vacated and repealed, and the following Rules for Lawyer Disciplinary Enforcement be and are hereby adopted.

* * *

Section 10. Sanctions.

A. Types of Sanctions. Misconduct shall be grounds for one or more of the following sanctions:

(1) Disbarment by the court. In any order or judgment of the court in which a lawyer is disbarred, the court retains the discretion to permanently disbar the lawyer and permanently prohibit any such lawyer from being readmitted to the practice of law.

* * *

Commentary of the Court to accompany Order dated July 19, 2001 amending Rule XIX

In the public interest, the Court has amended Louisiana Supreme Court Rule XIX to codify Permanent Disbarment as an available sanction for attorney misconduct. While the Court has always had the discretion to deny an application for readmission after the requisite five (5)-year waiting period after disbarment, an attorney who is permanently disbarred under these circumstances will be prohibited from applying for readmission to the bar. The amendments reflect the judgement of the Court that in some instances lawyer misconduct may be so egregious as to warrant a sanction of permanent disbarment based on the facts of an individual case and in consideration of the guidelines set forth in Appendix E to the Rules of Lawyer Disciplinary Enforcement. The amendments are substantially similar to the recommendations of the Office of Disciplinary Counsel and the House of Delegates of the Louisiana State Bar Association.

In adopting these amendments to Rule XIX, the Court has carefully considered the differences between the sanctions of disbarment and suspension, which differences are both substantive and significant. A suspended lawyer remains a lawyer during the period of suspension, retains a license to practice, but cannot practice law during the term of the suspension. However, one who has been disbarred loses his license to practice law. A suspension is imposed for a limited time, currently a maximum of three (3) years. An attorney who has been disbarred but not declared to be "permanently" disbarred under these amendments may apply for readmission after a period of five (5) years. The granting of readmission is within the sole discretion of the Court and is based upon the strict criteria enumerated in

Rule XIX, Section 24(E). Unless such readmission is petitioned for and is granted, a disbarment is effectively permanent.

The amendments we now adopt recognize that there are some types of misconduct that are so serious that where the sanction of disbarment is imposed, an application for readmission will not be considered.

KIMBALL, Justice, concurring in part and dissenting in part

I concur in part and dissent in part from this court's Order, dated July 19, 2001, which amends the Rules for Lawyer Disciplinary Enforcement to provide for permanent disbarment. Prior to this amendment, there was no provision in the Rules allowing this court to permanently disbar an attorney. Rather, a "disbarred" lawyer could petition the court for readmission to the practice of law after five years. The amendment retains this procedure, but allows the court, in its discretion, to effectively override this provision and impose "permanent disbarment," whereby attorney is permanently prohibited from being readmitted to the practice of law. While I commend the majority for initiating a type of disbarment that is permanent in nature, in my view, the Rules should not provide for different categories of disbarment.

Although the sanction of disbarment under the Rules has always provided that an attorney can be readmitted after five years, the term "disbarment" imparts a notion of permanency to the public and leads the public to believe that such sanction is permanently imposed. I believe that "disbarment" with the option for readmittance in five years is essentially a suspension and, there-

fore, misleads the public as to the ramifications of the sanction. The current rule still obfuscates the reality that attorneys who are "disbarred" will none-the-less be able to apply for readmission in five years. In my opinion, the public would be better served if this court were to increase the time an attorney guilty of misconduct may be suspended[1] and provide that all disbarments are permanent. I believe that suspension should be used in those cases where it is believed an attorney may be used in those cases where it is believed an attorney may be successfully rehabilitated and able to resume the practice of law, and I would reserve the sanction of disbarment, which by its very terms conveys an idea of permanency, for situations involving the most egregious misconduct.

* * *

Section 24. Reinstatement and Readmission.

A. Generally. A disbarred lawyer or a suspended lawyer who has served a suspension period of more than one year, exclusive of any waivers or periods of deferral, shall be reinstated or readmitted only upon order of the court. No lawyer may petition for reinstatement until six months before the period of suspension has expired. No lawyer may petition for readmission until five years after the effective date of disbarment. A lawyer who has been placed on interim suspension and is then disbarred for the same misconduct that was the ground for the interim suspension may petition for readmission at the expiration of five years from the time of the effective date of the interim sus-

---

[1] Currently, the court may fix a period of suspension not in excess of three years as a sanction for misconduct. Supreme Court Rule XIX §10(A)(2).

pension. The court retains the discretion, in accordance with Section 10A of this rule, to permanently disbar a lawyer and permanently prohibit any such lawyer from being readmitted to the practice of law.

* * *

APPENDIX E. GUIDELINES DEPICTING CONDUCT WHICH MIGHT WARRANT PERMANETN DISBARMENT, SUGGESTED BY THE COMMITTEE TO STUDY PERMANENT DISBARMENT

The following guidelines illustrate the types of conduct which might warrant permanent disbarment. These guidelines are not intended to bind the Supreme Court of Louisiana in its decision making. It is hoped that these guidelines provide useful information to the public and to lawyers concerning the types of conduct the Court might consider to be worthy of permanent disbarment.

GUIDELINE 1. Repeated or multiple instances of intentional conversion of client funds with substantial harm.

GUIDELINE 2. Intentional corruption of the judicial process, including but not limited to bribery, perjury, and subornation of perjury.

GUIDELINE 3. An intentional homicide conviction.

GUIDELINE 4. Sexual misconduct which results in a felony criminal conviction, such as rape or child molestation.

GUIDELINE 5. Conviction of a felony involving physical coercion or substantial damage to person or property, including but not limited to armed robbery, arson, or kidnapping.

GUIDELINE 6. Insurance fraud, including but not limited to staged accidents or widespread runner-based solicitation.

GUIDELINE 7. Malfeasance in office which results in a felony conviction, and which involves fraud.

GUIDELINE 8. Following notice, engaging in the unauthorized practice of law subsequent to resigning from the Bar Association, or during the period of time in which the lawyer is suspended from the practice of law or disbarred.

GUIDELINE 9. Instances of serious attorney misconduct or conviction of a serious crime, when the misconduct or conviction is preceded by suspension or disbarment for prior instances of serious attorney misconduct or conviction of a serious crime. Serious crime is defined in Rule XIX, Section 19. Serious attorney misconduct is defined for purposes of these guidelines as any misconduct which results in a suspension of more than one year.

Approved by Supreme Court July 19, 2001, effective Aug. 1, 2001.

APPENDIX G

EXCERPTS FROM LETTER OF SEPTEMBER 10, 2003, TO DONALD O. PINKSTON FROM CHARLES B. PLATTSMIER, CHIEF OF DISCIPLINARY COUNSEL OF THE LOUISIANA ATTORNEY DISCIPLINARY BOARD ADVISING MR. PINKSTON THAT PURSUANT TO SUPREME COURT RULE 5.5(d) DISCIPLINARY ORDERS ISSUED AFTER JULY 1, 2002 PROHIBITED EMPLOYMENT OF DISBARRED LAWYERS.

[Filed SEP 23 2003]

[SEAL]

LOUISIANA ATTORNEY DISCIPLINARY BOARD
Office Of The Disciplinary Counsel
4000 S. Sherwood Forest Blvd.
Suite 607
Baton Route, Louisiana 70816
(225) 293-3900 • 1-800-326-8022 •
FAX (225) 293-3300

September 10, 2003

CERTIFIED MAIL: RETURN RECEIPT REQUESTED: 7196 9979 7490 0005 1689

Mr. Donald O. Pinkston
Suite 712, 4948 Chief Menteur Highway
New Orleans, LA 70126-3730

RE: Section 26 Requirement

Dear Mr. Pinkston:

By order of the Louisiana Supreme Court dated September 5, 2003, in Disciplinary Proceeding No. 2002-B-3251 and 2002-B-3252, you were permanently disbarred.

* * *

As to discipline orders issued after July 1, 2002, the Supreme Court of Louisiana instituted Rule 5.5(d) which prohibits employment of disbarred attorneys, and requires registration for suspended attorneys.

* * *

Sincerely,

/s/ Charles B. Plattsmier
CHARLES B. PLATTSMIER
Chief Disciplinary Counsel

APPENDIX H

EXCERPT FROM LOUISIANA RULES OF PROFESSIONAL CONDUCT 5.5 EXISTING PRIOR TO JULY 1, 2002

Rule 5.5. Unauthorized practice of law.

A lawyer shall not:

(a) Practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) Assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

APPENDIX I

EXCERPT FROM LOUISIANA RULES OF PROFESSIONAL CONDUCT 5.5 EFFECTIVE JULY 1, 2002

Rule 5.5. Unauthorized practice of law.

A lawyer shall not:

* * *

(c) employ, contract with as a consultant, engage as an independent contractor, or otherwise join in any other capacity, in connection with the practice of law, any person the attorney knows or reasonably should know is a disbarred attorney, during the period of disbarment; or

* * *

2002 Amendment – Date Effective and Application

Part 1 of a Supreme Court Order dated April 4, 2002 amends Rule 5.5 of the Louisiana Rules of Professional Conduct. Part 2 of the Order provides:

"This rule shall become effective on July 1, 2002, and shall apply to all lawyers who are suspended or disbarred by any Order, Judgment, or Decree of the Court which becomes final after the effective date."

Supreme Court, U.S.
FILED
JAN 5 - 2004
OFFICE OF THE CLERK

No. 03-810

In The Supreme Court of the United States

DONALD O. PINKSTON,

Petitioner,

versus

OFFICE OF DISCIPLINARY COUNSEL OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Louisiana

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RICHARD P. IEYOUB
Attorney General
State of Louisiana

ROBERT E. HARROUN, III
Deputy Attorney General

ANDRÉ CHARLES CASTAING*
Assistant Attorney General

Louisiana Department of Justice
Litigation Division
1885 N. 3rd St. – Third Floor
P. O. Box 94005
Baton Rouge, LA 70804-9005
Telephone: (225) 326-6300
Fax: (225) 326-6495

Counsel for Respondent, Office of the Disciplinary Counsel

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Must the Louisiana Attorney Disciplinary rules and Procedures which cover the disbarring of attorneys comply with both procedural and substantive due process?

   1. Are the notice requirements of procedural due process infringed by application of permanent disbarment and foreclosure of employment and contractual relationship with lawyers' rules where permanent disbarment and employment preclusion were not a penalty when Petitioner wrongfully violated "the most fundamental duty of an officer of the court" by making false statements to a judge and concealing evidence from the court which should have been revealed and injuring clients through neglect of legal matters, failure to account and to return unearned legal fees?

   2. Does "fundamental fairness" and "fair warning" require that the punishment of permanent disbarment and employment preclusion be known at the time of wrongful conduct?

II. May Louisiana's new Supreme Court Rules, providing for a penalty of permanent disbarment and employment preclusion, be applied retroactively without violating the constitutional prohibition against state *ex post facto* laws?

PARTIES

The parties in this Court and the court below are as follows:

Petitioner: Donald O. Pinkston was the respondent before the Louisiana Attorney Disciplinary Board and in the Supreme Court of Louisiana.

Respondent: The Office of the Disciplinary Counsel prosecuted the petitioner before the Louisiana Attorney Disciplinary Board and in the Supreme Court of Louisiana.

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This court should deny the former lawyer Pinkston's petition for a writ of certiorari. The Louisiana Supreme Court permanently disbarred Mr. Pinkston for a variety of professional misconduct, including subverting the judicial process by manipulating a client's criminal sentencing, neglecting legal matters, failing to promptly provide accountings, and failing to return unearned fees to his clients.

Pinkston's petition does not assert that the Louisiana Supreme Court's decision conflicts with any decisions of this court, of a federal court of appeals, or of the highest court of another state. This case does not raise any federal issues of broad applicability. In fact, most of the former lawyers' claims effect only a small group of Louisiana lawyers who committed significant violations of Louisiana's attorney disciplinary rules ("disciplinary rules") in a narrow time frame.

JURISDICTION

The respondent agrees that this Court has jurisdiction under 28 U.S.C. §1257 to review the 20 May 2003 ruling of the Supreme Court of Louisiana and that court's 5 November 2003 denial of Pinkston's application for rehearing.

STATEMENT OF THE CASE

A. Parties.

The petitioner ("former lawyer") is Donald O. Pinkston.

The respondent is the Office of the Disciplinary Counsel of the Louisiana Attorney Disciplinary Board.

B. Facts and Procedural History.

The statement of this case and its procedural history are fully and clearly set out in the Louisiana Supreme Court's 20 May 2003 opinion reproduced at Petitioner's Appendix D.

REASONS FOR DENYING THE WRIT

I. DUE PROCESS.

Former lawyer Pinkston's due process challenges to his disbarment do not merit this court's attention. The Louisiana Supreme Court's decision does not conflict with any decision of this Court, of a federal court of appeals, or of the highest court of another State.[1] His due process challenges do not present important questions of federal law.[2] Instead, his claims lack arguable merit and ask this court to overturn the Louisiana Supreme Court's interpretation of Louisiana law.

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[1] Supreme Court Rule 10(b) & (c).

[2] Supreme Court Rule 10(c).

A. Retroactive application of the permanent disbarment rule to his conduct.

Former lawyer Pinkston asserts that the Louisiana Supreme Court violated his 14th Amendment due process rights by applying a "new" permanent disbarment rule to him. He asserts that he had no notice at the time he committed his misconduct that he might face permanent disbarment.

First, Pinkston's argument lacks merit because permanent disbarment is not a "new" possible sanction. The possible sanctions available to the Louisiana Supreme Court in attorney disciplinary cases are a matter of Louisiana law. This court is bound to accept the interpretation of Louisiana law by the Supreme Court of Louisiana (the highest court of the State).[3] The Louisiana Supreme Court has expressly held that permanent disbarment is not a "new" sanction:[4]

> Given this court's absolute discretion over readmission, it is beyond dispute that this court has always had the unfettered authority to refuse readmission to disbarred attorneys, including the right to do so on a permanent basis.
>
> Thus, it is clear the amendments to Supreme Court Rule XIX, § 10(A) and § 24(A) do not represent a substantive change to the bar disciplinary rules, nor do they result in the adoption of a

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[3] *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488, 96 S.Ct. 2308, 2312, 49 L.Ed.2d 1 (1976).

[4] App. A, p. 12a; *In re Laudumiey*, 2003-0234, p. 10 (La. 6/27/03), 849 So.2d 515, 522, *cert. denied*, ___ U.S. ___, 124 S.Ct. ___, ___ L.Ed.2d ___ (12/1/2003).

> new sanction which did not previously exist. Rather, these amendments simply represent a procedural change to Supreme Court Rule XIX in order to recognize a power this court has always possessed.

The Louisiana Supreme Court repeated that holding in its denial of Pinkston's petition for rehearing:[5]

> As this court has recognized, permanent disbarment does not represent a new sanction which did not previously exist; rather, it is simply a procedural change to the rule which recognizes a power the court has always possessed.

Second, Pinkston's citation to *In re: Ruffalo*[6] is misplaced. *Ruffalo* held that an attorney is entitled to notice of the *charges* against him prior to the disciplinary hearing.[7] Pinkston does not claim that he was not provided notice of the specific charges of misconduct brought against him. Instead, he alleges that he was entitled to specific notice of the potential *penalties* he faced.

Ignorance of the law is no excuse.[8] If ignorance of the law generally is no defense to a criminal charge,[9] ignorance of the potential penalty in an attorney disciplinary case is even less of an excuse. The Louisiana Supreme

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[5] App. A, p. 2a; *In re Pinkston*, 2002-3251 (La. 9/5/03) (denial of rehearing), 852 So.2d 966, 976.

[6] 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968).

[7] 390 U.S. at 550, 88 S.Ct. at 1226.

[8] *Bryan v. U.S.*, 524 U.S. 184, 195, 118 S.Ct. 1939, 1947, 141 L.Ed.2d 197 (1998).

[9] *Ratzlaf v. U.S.*, 510 U.S. 135, 149, 114 S.Ct. 655, 663, 126 L.Ed.2d 615 (1994).

Court's new permanent disbarment procedures became effective on 1 August 2001.[10] This was 8 months prior to the 28 March 2002 Disciplinary Board hearing concerning the charges against Pinkston[11] and even longer before the Louisiana Supreme Court oral argument. Accordingly, Pinkston had adequate notice during the disciplinary proceedings of the potential sanctions he faced.

B. Fair warning.

Next, Pinkston alleges that permanent disbarment violated his 14th Amendment due process rights because he did not have "fair warning" at the time he committed his misconduct that he could be permanently disbarred.

As with his retroactivity argument, this argument is foreclosed by the fact that permanent disbarment is not "a new sanction which did not previously exist"[12] but, instead, is a power the Louisiana Supreme Court "has always possessed".[13]

Additionally, Pinkston admits that at the time he committed his misconduct, Louisiana's rules expressly provided that he could be disbarred with only a hope of discretionary readmission after 5 years. It is somewhat disingenuous for him to argue that had he only been aware that he could be permanently disbarred without the hope of discretionary readmission, he would not have

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[10] *In re: Laudumiey*, p. 7, 849 So.2d at 520.

[11] Opposition, App. A, p. 3a.

[12] Petition, App. A, p. 2a.

[13] Petition, App. A, p. 2a.

subverted the judicial process by manipulating his client-Small's criminal sentencing or engaged in any of the other professional misconduct involved in this case.

Accordingly, this issue does not merit this court's attention.

II. FORMER LAWYER PINKSTON'S EX POST FACTO CHALLENGE DOES NOT MERIT THIS COURT'S ATTENTION.

Former lawyer Pinkston's *ex post facto* challenge to his disbarment does not merit this court's attention. The Louisiana Supreme Court's decision does not conflict with any decision of this Court, of a federal court of appeals, or of the highest court of another State.[14] His *ex post facto* challenge is not an important question of federal law[15] because it does not have broad applicability. Rather, his challenge addresses only the severity of his sanction: permanent disbarment as opposed to disbarment with the ability to apply for discretionary readmission after 5 years. Pinkston's *ex post facto* claim applies only to the small number of Louisiana lawyers who committed serious misconduct prior to 1 August 2001. Further, his challenge lacks arguable merit.

First, the former lawyer correctly notes that the *Ex Post Facto* Clause[16] prohibits a state from enacting a "law that aggravates a crime, or makes it greater than it was,

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[14] Supreme Court Rule 10(b) & (c).

[15] Supreme Court Rule 10(c).

[16] U.S. Constitution, Art. I, §10, cl. 1.

when committed".[17] However, he fails to recognize that this rule does not apply to his case because permanent disbarment is not a "new" sanction.

As stated above, the possible sanctions available to the Louisiana Supreme Court in attorney disciplinary cases is a matter of Louisiana law and this court is bound to accept the Supreme Court of Louisiana's interpretation of Louisiana law.[18] In rejecting Pinkston's *ex post facto* argument, the Louisiana Supreme Court expressly held that permanent disbarment is not a "new" sanction:[19]

> As this court has recognized, permanent disbarment does not represent a new sanction which did not previously exist; rather, it is simply a procedural change to the rule which recognizes a power the court has always possessed. *See In re: Laudumiey and Mann*, 03-0234 (La. 6/27/03), at p. 10, ___ So.2d ___ ("[t]hus, it is clear the amendments to Supreme Court Rule XIX, § 10(A) and § 24(A) do not represent a substantive change to the bar disciplinary rules, nor do they result in the adoption of a new sanction which did not previously exist. Rather, these amendments simply represent a procedural change to Supreme Court Rule XIX in order to recognize a power this court has always possessed").

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[17] *Stogner v. California*, ___ U.S. ___, ___, 123 S.Ct. 2446, 2450, 156 L.Ed.2d 544 (2003), citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648 (1798).

[18] *Hortonville*, 426 U.S. at 488, 96 S.Ct. at 2312.

[19] App. A, p. 2a; *In re Pinkston*, p. 2 (on rehearing), 852 So.2d at 976.

Contrary to Pinkston's claim that permanent disbarment is a "new" potential punishment, the Supreme Court of Louisiana has always had that power:[20]

> Given this court's absolute discretion over readmission, it is beyond dispute that this court has always had the unfettered authority to refuse readmission to disbarred attorneys, including the right to do so on a permanent basis.

Pinkston's *ex post facto* argument asks this court to reverse the Louisiana Supreme Court's interpretation of Louisiana law that held the court "has always possessed" the power to permanently disbar a Louisiana lawyer. To do so would require this court to reverse its *Hortonville* decision, to displace a state's highest court as the ultimate interpreter of state law, and instead to install this court as the ultimate interpreter of state law. The former lawyer cites no authority for such a tectonic shift in bedrock federalism principles.

Second, Pinkston's "fair warning" claim is misplaced. This court held in *Rogers v. Tennessee*[21] that the "fair warning" concept is rooted in the Due Process Clause, not the *Ex Post Facto* Clause.

Third, the record contradicts Pinkston's "fair warning" claim. He apparently concedes that the Louisiana Supreme Court has always had the power to create the sanction of permanent disbarment, but argues that the

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[20] *In re: Laudumiey*, p. 10, 849 So.2d at 522.

[21] 532 U.S. 451, 459, 121 S.Ct. 1693, 1699, 149 L.Ed.2d 697 (2001).

court did not exercise that power until after his misconduct occurred:[22]

> The fact that the Louisiana Supreme Court had the power [to create the sanction of permanent disbarment] does not alter the *ex post facto* issue. A legislature has the power to increase the punishment for a crime at any time. The issue is retroactivity to the offense.

But the record reflects that permanent disbarment was not a newly created sanction:[23]

> As this court has recognized, permanent disbarment does not represent a new sanction which did not previously exist;

The issue is not, as Pinkston asserts, that the Supreme Court of Louisiana merely possessed the power to create that new sanction. The court found, as a matter of Louisiana law, that permanent disbarment was not a new sanction at all. As noted above, this court is bound to accept the interpretation of Louisiana law by the Supreme Court of Louisiana.[24]

Fourth, the former lawyer's argument is somewhat incredible. He asserts that the threat of permanent disbarment somehow would have deterred him from his serious legal misconduct – including his intentional corruption of the judicial process in the *Small* sentencing

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[22] Petition, pp. 13-14.

[23] App. A, p. 2a; *In re Pinkston*, p. 2 (on rehearing), 852 So.2d at 976.

[24] *Hortonville*, 426 U.S. at 488, 96 S.Ct. at 2312.

matter – when the threat of disbarment for at least 5 years with only a hope of discretionary readmission failed to deter him.

Accordingly, former lawyer Pinkston fails to show that this court should exercise its discretion and hear his *ex post facto* challenge to his disbarment.

III. FORMER LAWYER PINKSTON'S CHALLENGES TO THE SPECIFIC SANCTION OF PERMANENT DISBARMENT ARE NOT RIPE.

The majority of former lawyer Pinkston's claims relate to the sanction of permanent disbarment. He admits that the Louisiana Supreme Court could have disbarred him. However, he asserts that he should have the opportunity to apply for readmission after 5 years. These claims are not ripe for review.

Ripeness "is peculiarly a question of timing".[25] No one knows what the future may bring. The former lawyer's claim will be ripe only if he seeks readmission 5 years from now, if he is otherwise eligible for readmission, and if the Louisiana Supreme Court denies his application based on the permanent disbarment rule. At that time there will be a sharply focused case and controversy based upon an actual implementation of his permanent disbarment.[26]

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[25] *Anderson v. Green*, 513 U.S. 557, 559, 115 S.Ct. 1059, 1060, 130 L.Ed.2d 1050 (1995).

[26] *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 60, 113 S.Ct. 2485, 2497, 125 L.Ed.2d 38 (1993) (an alien's challenges to new INS regulations are not ripe until the alien's application for a change in status is denied based upon the new regulations).

As a result, former lawyer Pinkston's claims concerning his sanction are not yet ripe at this time.

IV. FORMER LAWYER PINKSTON DID NOT RAISE HIS "EMPLOYMENT PRECLUSION" CLAIMS IN THE LOUISIANA SUPREME COURT.

In Pinkston's first question presented, he challenges Louisiana's employment preclusion rule on due process grounds. In his second question presented, former lawyer Pinkston challenges that rule on *ex post facto* grounds. This court should not grant a writ on the employment preclusion issue.

First, Pinkston's writ application does not develop his *ex post facto* issue. He mentions employment preclusion in the questions presented and again (in passing) in the introductory section of his "Reasons for Granting the Writ".[27] While Pinkston mentions employment preclusion in his discussion of the due process issues,[28] he does not mention the employment preclusion rule in his discussion of the *ex post facto* issues.[29] That discussion is exclusively devoted to his *ex post facto* challenge to his permanent disbarment.

Second, this court will not reach issues that the petitioner did not raise or brief below.[30] A petitioner

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[27] Petition, p. 6.

[28] Petition, pp. 8-13.

[29] Petition, pp. 13-17.

[30] *TRW Inc. v. Andrews*, 534 U.S. 19, 34, 122 S.Ct. 441, 451, 151 L.Ed.2d 339 (2001).

seeking review of a state court judgment must identify in his writ application where in the state court proceedings he raised the federal issues presented to this court for review.[31]

Pinkston's writ application does not show where he raised his employment preclusion challenges in the Louisiana Supreme Court. He does not raise the issues in his Petition for Rehearing in the Louisiana Supreme Court.[32] Pinkston did not submit his original Louisiana Supreme Court brief in his Appendix to his writ application, so this court cannot determine if he raised the issues in that document. The Louisiana Supreme Court did not address the employment preclusion issues in either its original decision or in its denial of Pinkston's application for rehearing. Accordingly, Pinkston has not properly preserved these issues for review.

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[31] Supreme Court Rule 14.1(g)(i).

[32] Petition, Appendix B, p. 3a.

CONCLUSION

This Court should deny Pinkston's petition for a writ of certiorari to the Supreme Court of Louisiana.

Respectfully submitted,

RICHARD P. IEYOUB
Attorney General
State of Louisiana

ROBERT E. HARROUN, III
Deputy Attorney General

ANDRÉ CHARLES CASTAING*
Assistant Attorney General

Louisiana Department of Justice
Litigation Division
1885 N. 3rd St. – Third Floor
P. O. Box 94005
Baton Rouge, LA 70804-9005
Telephone: (225) 326-6300
Fax: (225) 326-6495

Counsel for Respondent,
Office of the Disciplinary Counsel

* *Counsel of Record*

APPENDIX A

PINKSTON, DONALD O.
99-DB-029, 00-DB-073 (12/30/2002)

LOUISIANA ATTORNEY DISCIPLINARY BOARD
IN RE: DONALD O. PINKSTON
NUMBERS 99-DB-029 AND 00-DB-073
RECOMMENDATION TO THE LOUISIANA SUPREME COURT

This is a disciplinary proceeding based upon the filing of formal charges against the Respondent, Donald O. Pinkston, by the Office of Disciplinary Counsel ("ODC"). For the reasons stated below, the Disciplinary Board recommends that the Respondent be disbarred from the practice of law.

PROCEDURAL HISTORY

Case Number 99-DB-029

Formal charges, consisting of one count, were filed against the Respondent, Donald O. Pinkston, on April 21, 1999. These charges allege that the Respondent violated Rules of Professional Conduct 1.2 (counseling or encouraging a client to engage in conduct that the lawyer knows is criminal or fraudulent); 3.3(a)(1) (knowingly making false statements of material fact or law to a tribunal); 3.3(a)(2) (knowingly failing to disclose that which a lawyer is required by law to reveal); 3.3(a)(4) (knowingly offering evidence that the lawyer knows to be false); 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); 8.4(a) (violating or attempting to

violate the Rules of Professional Conduct); 8.4(d) (engaging in conduct that is prejudicial to the administration of justice). The Respondent filed an answer to the formal charges on June 2, 1999, denying that his conduct constituted violations of the Rules of Professional Conduct as charged.

ODC filed its Pre-Hearing Memorandum on December 4, 2000. The Respondent filed his Pre-Hearing Memorandum on December 11, 2000. The hearing in this matter was held before Hearing Committee Number Twenty-Four on December 14, 2000. ODC filed its Post-Hearing Memorandum on January 24, 2001, and the Respondent filed his Post-Hearing Memorandum on April 6, 2001. The hearing committee issued its report on May 9, 2001, recommending that the Respondent be disbarred from the practice of law.

Case Number 00-DB-073

Formal charges, consisting of seven counts, were filed against the Respondent on June 12, 2000. These charges allege that the Respondent violated Rules of Professional Conduct 1.3 (failure to act with diligence), 1.4 (lack of communication), 1.5 (failure to properly handle a fee dispute by promptly returning unearned portion of fee), 1.15 (failure to provide an accounting), 1.16(d) (failure to return advance payment of fee that has not been earned), 5.5 (unauthorized practice of law), 8.1(a) (knowingly make a false statement of material fact in a disciplinary matter), 8.4 (a) (violating the Rules of Professional Conduct), 8.4 (c) (engaging in conduct involving dishonest, fraud, deceit or misrepresentation) and 8.4(d) (engaging in conduct that is

prejudicial to the administration of justice). The Respondent answered these charges on July 5, 2000, denying the allegations.

ODC filed its Pre-Hearing Memorandum in this matter on September 6, 2000. The Respondent did not file a Pre-Hearing Memorandum. The hearing before Hearing Committee Number Twenty-Four was held on September 14, 2000. ODC filed its Post-Hearing Memorandum on November 30, 2000. The Respondent also filed his Post-Hearing Memorandum on November 30, 2000. The hearing committee issued its report on March 8, 2001, recommending that the Respondent be suspended from the practice of law for thirty months and that he be required to file a petition for reinstatement. The committee also recommended that the Respondent be required to pay restitution to several individuals and that he be assessed with the costs of the disciplinary proceedings.

After several continuances, oral argument for case number 99-DB-029 and case number 00-DB-073 was held before Panel C of the Disciplinary Board on March 28, 2002.[1] Chief Disciplinary Counsel Charles B. Plattsmier appeared on behalf of ODC. The Respondent and his counsel, Herbert V. Larson, Jr., also appeared.

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[1] Although neither party filed a motion to consolidate these cases, in the interest of judicial economy, the Board set the cases for oral argument on the same date and issues the instant recommendation addressing both matters.

THE FORMAL CHARGES

The formal charges in case number 99-DB-029 read, in pertinent part, as follows:

COUNT I

Donald O. Pinkston undertook the representation of Dwayne Small in connection with post-conviction relief efforts. Dwayne Small is the Respondent's stepson, the child of his wife from a prior union. Defendant Small pled guilty to manslaughter and was sentenced to 21 years in prison. Five years later the Respondent was engaged by Dwayne Small to assist him in getting his sentence "corrected." A motion to correct the sentence was filed and presented to then Judge Ad Hoc Ike Spears on June 15, 1996. Based upon certain representations made to the Court by Pinkston, Small's sentence was reduced to 12 years at hard labor. The State objected to the sentence reduction and filed a Motion for Reconsideration. Judge Spears eventually granted the State's Motion for Reconsideration and reinstated the original sentence to 21 years at hard labor. Neither the State nor the defendant sought supervisory relief. The defendant did, however, seek to have the matter brought before Section C (previously Ad Hoc Judge Ike Spears' division) and by minute entry Judge Hunter determined that the matter was satisfied and the case was closed.

For reasons which are unclear but which may have involved manipulation of the Court's docket by the clerk's minute clerk, the Dwayne Small matter was placed on the March 21, 1997 docket of Judge Julian Parker, Division G. The Respondent appeared in Court on that day and represented to

Judge Parker that Judge Hunter had recused herself when in fact Judge Hunter had never recused herself. The Court accepted Pinkston's oral representation to the Court and therefore entertained Donald Pinkston's Motion to Correct an Excessive Sentence indicating that Judge Ike Spears had previously misspoken in June of 1996 when he reduced the sentence to 12 years rather than to 9 years as had been originally contemplated. The Respondent specifically failed to advise the Court that Judge Spears had rescinded his earlier order and had reinstated the 21 year jail term.

The Court accepted Pinkston's word and directed that an amended minute entry be sent to the Department of Corrections whereby a sentence of nine years was imposed resulting in the immediate release from custody of the defendant, Dwayne Small.

Thereafter, upon being alerted by the D.A.'s Office that they objected to this entry of sentence, Judge Parker investigated the matter and determined that the full facts had not been explained by Pinkston and that certain misrepresentations had been made to the Court. Judge Parker went on to note that the October 14, 1996 entry of Judge Spears reversing his earlier reduction of sentence and reinstating the 21 years hard labor sentence was missing from the record. The error was detected by the Department of Corrections and the District Attorney's Office and the defendant, Dwayne Small, was then reapprehended, the record corrected, and he was resentenced to serve his 21 years in jail. The minute clerk working for Judge Julian Parker at the time, Delwin Davis, has since been discharged

by Judge Parker. The respondent's conduct constitutes counseling or encouraging a client to engage in conduct that the lawyer knows is criminal or fraudulent in violation of Rule 1.2(c); knowingly making false statements of material fact or law to a tribunal in violation of Rule 3.3(a)(1); knowingly failing to disclose that which he is required by law to reveal in violation of 3.3(a)(2); knowingly offering evidence that the lawyer knows to be false in violation of Rule 3.3(a)(4); engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 8.4(c); violating or attempting to violate the Rules of Professional Conduct in violation of Rule 8.4(a); and engaging in conduct that is prejudicial to the administration of justice in violation of Rule 8.4(d).

The formal charges in case number 00-DB-073 read, in pertinent part, as follows:

COUNT I

Respondent was paid $3,500.00 by Irene McDowell to assist in Kevin McDonald's criminal case. Respondent did little or no work and failed to account for any earned portion and has failed to refund any of the unearned portion in violation of Rules 1.3, 1.4,1.5,1.15,1.16(d) and 8.4(a)(c) of the Rules of Professional Conduct.

COUNT II

Respondent was paid by Ammie Isaac to handle a criminal matter for Emanuel Isaac. Respondent failed to complete the work, failed to account for any earned portion of the fee and failed to return the unearned portion of the fee, in violation of Rules 1.3 and 1.16 of the Rules of Professional Conduct.

COUNT III

Respondent was paid by David Singleton to handle a criminal matter. Respondent failed to complete the work, failed to account for any earned portion of the fee and failed to return the unearned portion of the fee, in violation of Rules 1.3, 1.4 and 1.16 of the Rules of Professional Conduct.

COUNT IV

Respondent agreed to participate in the Louisiana State Bar Association Alternative Dispute Resolution Program. The arbitrator awarded Respondent's client $3,000.00, which reflected the unearned portion of Respondent's fees. Respondent has failed to refund this amount and Respondent is in violation of Rules 8.1(a) [and] 8.4(a)(c)(d) of the Rules of Professional Conduct.

COUNT V

Respondent was paid by Charles Martin to handle a criminal matter in Mississippi. Respondent is not licensed to practice law in Mississippi and did not file the necessary paperwork to appear pro hac vice in Mississippi and was therefore practicing in a state where he is not licensed in violation of Rule 5.5 of the Rules of Professional Conduct.

COUNT VI

Respondent was paid by Hilda Jones to handle a criminal matter for Keith Jones. Upon suspension from the practice of law, Respondent failed to account for any earned portion of the fee and to promptly refund the unearned fee to Mrs. Jones in violation of Rule 1.16 of the Rules of Professional Conduct.

COUNT VII

Respondent was paid $2,300.00 by Agnes Motton and Zina Nunnery to handle a post conviction matter for Frank Motton. Respondent did not complete the work and failed to account for any earned portion and refused to refund the unearned portion in violation of Rules 1.3, 1.4, 1.5 [and] 1.16 of the Rules of Professional Conduct.

THE HEARING COMMITTEES' REPORTS

Case Number 99-DB-029

The hearing committee made the following factual findings in this matter:

"Dwayne Small was a defendant in Orleans Parish Criminal District Court, charged with the commission of a homicide. It was on the docket of Judge Jerome Winsberg, Section "C." As part of a plea bargain, the District Attorney's Office reduced the charge to manslaughter in exchange for a guilty plea and a sentence of 21 years. Small was represented by Ernest Caulfield. The plea was accepted, a 21-year sentence was imposed by Judge Winsberg, and Small began serving his sentence in or about 1992.

Dwayne Small is the stepson of the Respondent. In 1995, Respondent enrolled as Counsel of record for Mr. Small and filed, on Small's behalf, a "Motion to Correct Excessive Sentence," which was scheduled for hearing in February of 1996. Before the motion was heard, Judge Winsberg retired, effective January 1996, and the Louisiana Supreme Court appointed Ike Spears to sit as Judge Pro Tempore in Section "C" pending a new election.

At the February 1996 hearing, Respondent argued that the "Sentencing Guidelines Grid" required a shorter sentence for Small's crime. Judge Spears reset the matter for March 1996, and in the interim the District Attorney's Office filed memorandum in opposition to the Motion to Reduce Excessive Sentence. In his testimony before the Committee, Judge Spears acknowledged that he did not believe the Respondent's arguments for a sentence reduction had sufficient merit to withstand appellate review, but he was willing to entertain the motion because Respondent assured him that the District Attorney, Harry Connick, or someone within Mr. Connick's office, had agreed not to oppose the motion. The Assistant District Attorney assigned to the case, Maurice Landrieu, who as testified before the Committee, could not confirm such an agreement. Judge Spears postponed the hearing of the motion several times to afford Respondent an opportunity to confirm the purported agreement not to oppose the motion, but Respondent was unable to do so.

On June 25, 1996, Judge Spears ruled on the motion and reduced Dwayne Small's sentence from 21 to 12 years, but stayed the effect of the order to enable the State to file writs. On July 2, 1996, Mr. Landrieu filed a motion seeing reconsideration of the sentence reduction. Judge Spears kept the stay in place and again continued hearings of the State's motion to permit Respondent an opportunity to confirm his purported agreement with the District Attorney's Office. Finally, on October 4, 1996, with Respondent present, Judge Spears granted the State's motion to reconsider and reinstated Dwayne Small's original 21 year sentence. At the request of the Respondent,

Judge Spears scheduled a status conference on the matter for November 1996.

Before that status conference, Sharon Hunter was elected to fill the vacancy in Section "C," and the matter passed to her. On November 15, 1996, she held a status conference, and the docket reflects that, "the status hearing considered held and satisfied," which in her deposition testimony the Judge said meant "nothing else was to be had." (Hunter Deposition, pg. 10). Small remained in prison.

For unexplained reasons, Dwayne Small's case appeared on the docket of Judge Julian Parker, Section "G", on March 21, 1997. On that day, Respondent represented to Court that "I have had an opportunity to discuss the matter with the Assistant District Attorney and pursuant to the conference that we held, I understand that a corrected minute entry needs to be sent to the Department of Corrections in the matter. We request the court to order a corrected minute entry be entered." (ODC Exhibit 8). Respondent represented to the court that Judge Spears had imposed a 12 year sentence on Dwayne Small, but that an error had been made and that the actual sentence should have been 9 years. Judge Parker reduced Small's sentence to 9 years. Small was released from prison.

Citizens in the community learned of Small's release and raised their concerns with the District Attorney's Office. Maurice Landrieu asked Judge Parker to convene a hearing to review the circumstances of the release. A hearing was held on October 8, 1997, and Judge Parker asked Respondent how and why the case was transferred to his Court from Section "C." Respondent replied, "It

was remanded to Section G by Judge Hunter. She recused herself." (ODC Exhibit 11). In a subsequent hearing on the same subject, how the matter got into Section "G," Respondent answered, "Your Honor, I have no idea. I have no connections with this building. I have no connections with Judge Hunter. I have no connections with the court. All I know is that the case was on the docket, I received a subpoena, I showed up." (ODC Exhibit 13). In a subsequent hearing before Judge Parker on this same issue, Mr. Landrieu informed the court that Judge Spears had reversed his reduction of the sentence and restored the original sentence of 21 years. Mr. Pinkston responded, "That's not true." (ODC Exhibit 19).

Judge Parker revoked his reduction of Small's sentence, and Respondent applied for writs to the Fourth Circuit Court of Appeal. That court requested a Per Curiam from Judge Parker explaining the situation, and in that statement the Judge declared that his court had been "misled" by Respondent as to what sentence Judge Spears had actually imposed on Small, and by Respondent's representation that Judge Hunter had recused herself. (ODC Exhibit 21). In her deposition, Judge Hunter testified that she had not recused herself from the Dwayne Small case.

Each of the Assistant District Attorneys present in Judge Parker's court on the day that Respondent first brought the Dwayne Small matter before the Judge state that Respondent had no conference with them on the matter."

In a subsequent section of its report, the hearing committee made the additional findings of fact:

1. Judge Ike Spears, sitting Pro Tempore in Section "C," reversed his earlier reduction of sentence of Dwayne Small and, on October 4, 1996, reinstated Mr. Small's 21-year sentence.

2. Judge Sharon Hunter, Judge in Section "C," did not recuse herself from consideration of Dwayne Small's case. The matter was marked closed on the docket of Section "C." Judge Hunter did not allot the case to Section "G."

3. Respondent misrepresented to Judge Parker (a) that Judge Sharon Hunter had recused herself when she had not; (b) that Judge Spears had reduced Dwayne Small's sentence to 12 years when in fact the Court had reinstated the 21 year sentence; and (c) that the minute entry by Judge Spears was erroneous and should be corrected to further reduce Dwayne Small's sentence to 9 years when there is no indication that Judge Spears ever intended to reduce Small's sentence to 9 years (and Mr. Spears testified that he never reduced the sentence to 9 years). Hearing Tr., pp. 86-91).

1. As a result of the misrepresentations by Respondent to the Court, Judge Parker signed a "corrected" minute entry that resulted in the temporary release of Dwayne Small from prison.

2. The testimony of Maurice Landrieu, Ike Spears, Judge Sharon K. Hunter, and Judge Julian Parker is credible with respect to the foregoing.

3. While no direct evidence establishes how the Dwayne Small case was moved onto Judge Parker's docket, both Judge Parker and Judge Hunter stated that they did not request or consent to the transfer. (ODC Exhibit 21; Hunter Deposition, page 13). If Respondent did not improperly cause the transfer, he nevertheless took advantage of it.

4. There was conflicting testimony as to whether an assistant district attorney was present when Judge Parker, on March 21, 1997, ordered Small's sentence reduced, but this issue was not material to the Committee's findings or recommendations.

The hearing committee found that ODC had proven by clear and convincing evidence violations of Rules of Professional Conduct 3.3(a)(1), 3.3(a)(2), 3.3(a)(4), 8.4(a), 8.4(c) and 8.4(d). The committee did not find a violation of Rule 1.2(c). The committee determined that the primary aggravating factors were Respondent's prior discipline[2] and his substantial experience in the practice of law. In mitigation, the committee found that the Respondent had cooperated with the disciplinary process. The committee recommended that the Respondent be disbarred, relying

[2] Respondent's prior discipline includes a previous two-year suspension for failure to maintain clients' funds in trust and failure to promptly pay medical providers See *In re Pinkston*, 98-1926 (12/11/98); 728 So.2d 381. Respondent has never been reinstated since the completion of that suspension. Respondent also received a reprimand in 1997 for misleading clients, failure to return an unearned fee, and commingling funds, and four admonitions between 1994 and 1995 for failure to cooperate by not filing written answers to complaints.

on Standards 6.11 and 7.1 of the ABA Standards for Imposing Lawyer Sanctions. The committee also noted that in the Respondent's pre-hearing memorandum he stipulated that "[t]he appropriate sanction for both charges brought by the Office of Disciplinary Counsel is disbarment, if the charges are proven by clear and convincing evidence."

Case Number 00-DB-073

The hearing committee made the following factual determinations and findings of rule violations in connection with this matter:

1. Count I: The committee found that while the Respondent may not have explicitly promised a specific result to Mr. McDonald, he reasonably believed that, for $3,500, Respondent would successfully obtain a bond hearing or favorable sentencing. The Respondent failed to do so. The committee found that the Respondent violated Rule 1.5(f)(6). The committee found no violations of Rules 1.3, 1.4, 1.15, 1.16(d) or 8.4(a)(c).

2. Count II: The committee found that the Respondent failed to diligently pursue Mr. Isaac's appeal and failed to communicate adequately with his client or Ms. Isaac about the status of the case. The committee found that the Respondent appeared in court on Mr. Isaac's behalf on at least two occasions, and that he did ultimately file an appeal brief on his client's behalf. The committee found that Respondent violated Rule 1.3, and though he was not formally charged with the

following, Rules 1.4 and 1.5(f)(6). The committee found no violation of Rule 1.16.

3. Count III: The committee determined that the evidence showed that the Respondent spoke on one occasion to the trial judge about a reduction of Mr. Singleton's sentence and spoke several times to Mr. Singleton's wife about the issue. He also spoke with Mr. Singleton several times about the matter and obtained Mr. Singleton's medical records in order to make a case for a sentence reduction or a transfer for his client. The committee found that the Respondent did not violate Rules 1.3, 1.4 and 1.16(d).

4. Count IV: The committee determined that the Respondent agreed to participate in the LSBA's Alternative [Fee] Dispute Resolution Program and was ordered to pay $3,000 to a former client, Ms. Alston. He paid $1,000 of this amount, but failed to pay the rest of the amount due. The committee found that the Respondent violated Rules 8.4(a) and 8.4(d) in connection with this count. Violations of Rules 8.1(a) and 8.4(c) were not found.

5. Count V: The committee found that the Respondent took the steps necessary to file the required documents with the Mississippi Circuit Court. Respondent appeared in court on two occasions, but his Mississippi co-counsel attended the hearing in which the client, Mr. Martin, entered a guilty plea to the charge of murder. Mr. Martin filed complaints with the Mississippi and Louisiana disciplinary authorities, alleging that the Respondent was not authorized to practice law in Mississippi. The Mississippi Bar Association, hearing the

same charges, found "no conduct of said attorney which would warrant any action under the disciplinary rules governing lawyers practicing in this state." The committee found that the Respondent did not violate Rules 5.5 or Rule 8.1(a). (A violation of Rule 8.1(a) was alleged in ODC's post-hearing memorandum).

6. Count VI: The committee found that the Respondent accepted payment from Ms. Jones on February 16, 1999 to handle a criminal matter for her son. He was subsequently suspended and failed to refund the $1,000 to Ms. Jones until August of 1999, after a disciplinary complaint was filed. The committee found that the Respondent violated Rule 1.16(d).

7. Count VII: The committee determined that the Respondent was retained in 1995 to represent Frank Motton. He was paid $2,300 by Agnes Motton and Zina Nunnery for his services. Over the next three years, he filed three writs of habeas corpus to have Mr. Motton brought to the district court for a hearing on Motton's application, but each time the matter was continued. Respondent admits that he did not earn the entirety of his fee. The committee also noted that "there is no credible evidence that the Respondent did communicate fully with its clients." The committee found that the Respondent violated Rules 1.3 and 1.5(f)(6). The committee did not find violations of Rules 1.4 and 1.16(d), however.

The committee relied upon Standards 4.12 and 4.42 of the ABA Standards for Imposing Lawyer Sanctions and

determined that the appropriate baseline sanction was suspension. The committee found the following aggravating factors to be present: prior discipline and pattern of misconduct. The sole mitigating factor found by the committee was cooperative attitude towards disciplinary proceedings. The committee also found that the Respondent owed restitution to Mr. McDonald, Ms. Isaac, Ms. Alston, Ms. Motton and Ms. Nunnery.

ANALYSIS

I. Standard of Review

The powers and duties of the Disciplinary Board are defined in Section 2 of the Louisiana Supreme Court Rule XIX, Rules for Lawyer Disciplinary Enforcement. Subsection (G)(2)(a) states that the Board is "to perform appellate review functions, consisting of review of the findings of fact, conclusions of law, and recommendations of hearing committees with respect to formal charges. . . . and prepare and forward to the court its own findings, if any, and recommendations."

Inasmuch as the Board is serving in an appellate capacity, the standard of review applied to findings of fact is that of "manifest error." *Arceneaux v. Domingue*, 365 So. 2d 1330 (La.1978); *Rosell v. ESCO*, 549 So. 2d 840 (La. 1989). The Board conducts a de novo review of the hearing committee's application of the Rules of Professional Conduct. *In re Hill*, 90-DB-004.

Case Number 99-DB-029

A review of the record in this matter reveals that the committee's findings of fact are not manifestly erroneous,

and the Board adopts the committee's findings. Further, the committee's application of the Rules of Professional Conduct is proper.

Case Number 00-DB-073

In this matter, the committee's findings of fact are not manifestly erroneous, and the Board adopts the committee's findings. The Board further notes as to Counts I and IV that at the oral argument held in this matter, the Respondent indicated that he had refunded 50% (or $1,750) of the fee paid to him by Mr. McDonald and the entire $3,000 which the LSBA Alternative Dispute Resolution Program had awarded to Ms. Alston. As to the committee's application of the Rules of Professional Conduct, the Board finds that the following errors are present:

1. Count I: A violation of Rule 8.4(a) (violating the Rules of Professional Conduct) should also be added to the violations present, although this violation adds little, if anything, to the sanction imposed.

2. Count II: The violations of Rules 1.4 and 1.5(f)(6) were not charged and will not be adopted by the Board. See *LSBA v. Keys*, 567 So.2d 588 (La. 1990) citing *LSBA v. McGovern*, 481 So.2d 574 (La. 1986) (due process prohibits sanctioning an attorney for unrelated misconduct revealed by the evidence in the disciplinary proceeding when the attorney has not been notified that the uncharged violations would be considered as disciplinary offenses or that he should be prepared to present a defense as to that misconduct). Along with a violation of Rule 1.3, a violation of Rule 1.16(d) is also present. The

Respondent did not properly terminate his representation with Mr. Isaac upon Respondent's suspension from the practice of law, which would include giving reasonable notice to the client, surrendering papers and property to which the client is entitled and refunding any advance payment of unearned fees.

3. Count VII: The hearing committee erred in failing to find a violation of Rule 1.4. Although the committee noted that "there is no credible evidence that the Respondent did communicate fully with its clients," it failed to find this rule violation. Mrs. Agnes Motton testified at the hearing that during the Respondent's representation of Frank Motton, the Respondent never wrote to her or called her to inform her of what was happening with the case. He never called her to make an appointment to come in to see him. She testified that she called him on one occasion to ask him the status of Frank's case. Respondent told her to bring some money with her, so she took a $100.00 money order and met with him. At that time, he told her that "Frank had a good case, and it was looking good, but at the meantime it was not active with the court." She did not get a letter from the Respondent concerning his suspension, and to her knowledge, her son did not ever receive a letter about Respondent's suspension. Hearing Tr., pp. 179-80; 188.

The Board finds that the hearing committee's application of the Rules of Professional Conduct in Counts III through VI are correct. The Board also finds that the aggravating factor of substantial experience in the practice

of law should be added to the aggravating factors cited by the committee.

II. Application of Factors Used in Imposing Sanctions

Louisiana Supreme Court Rule XIX, Section 10(C) states that in imposing a sanction after a finding of lawyer misconduct, the Court or Board shall consider the following factors:

1. whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession;

2. whether the lawyer acted intentionally, knowingly, or negligently;

3. the amount of actual or potential injury caused by the lawyer's misconduct; and

4. the existence of any aggravating or mitigating factors.

Here, the Respondent has violated duties owed to his clients, the public, the legal system and the profession. His conduct was knowing and intentional. In case number 99-DB-029, actual injury to the legal system and the public was present in that the Respondent misrepresented the true status of Dwayne Small's sentence to the court, and Mr. Small, a violent criminal, was released from prison years before his scheduled release date. In case number 00-DB-073, actual injury again is present. In several instances, the Respondent failed to provide accountings to his clients or to promptly return (or return at all) unearned fees, delayed his clients legal matters, and failed to promptly refund fees to his former client, Ms. Alston, as

instructed by the LSBA's Alternative Dispute Resolution Program.

The Board will adopt the aggravating factors found by the committees including prior discipline, substantial experience in the practice of law, and pattern of misconduct. The sole mitigating factor found by the committees was cooperative attitude toward the disciplinary proceedings. The Board finds that this mitigating factor is supported by the record and also will adopt it.

III. The Appropriate Sanction

Considering the misconduct present in both cases, disbarment is the appropriate sanction. Under Standard 6.11, "disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding." Under Standard 4.61, "disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potentially serious injury to a client." Standard 7.1 states that "disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and caused serious or potentially serious injury to a client, the public, or the legal system." In case number 99-DB-029, the respondent made a false statement and withheld material information to Judge Parker in connection with the Small matter. His misconduct in 00-DB-073 reveals a pattern of deception of

clients (i.e., promising favorable results which never materialize) and resulting fee disputes. Finally, his failure to honor his agreement to pay Ms. Alston the amount awarded to her in the LSBA Fee Dispute Program is a violation of his duty owed as a professional, which caused monetary injury to her.

Initially, the Board notes that case law indicates that, taken alone, the sanction for the Respondent's misrepresentation to the court carries a heavy sanction. In *In re Soileau*, 99-B-0441 (La. 6/18/99); 737 So.2d 23, formal charges were filed against the respondent, a former city court judge, based upon his criminal conviction for three misdemeanor hunting offenses of the Migratory Bird Treaty Act, failure to report his misconduct, and his misstatements of facts pertaining to his previous criminal record during his federal sentencing hearing. *Id.* at 25. The Court later determined that the respondent's misrepresentation to the federal magistrate judge was proven by clear and convincing evidence. A suspension from the practice of law for two years, with one year deferred, followed by a two-year period of probation was imposed by the Court. *Id.* at 27.

Likewise, in *LSBA v. Harrington*, 585 So.2d 514 (La. 1990), the Court imposed a nine month suspension for a lawyer's misconduct involving two instances of making false statements, one involving misleading opposing counsel and the court, two instances of unduly embarrassing, delaying or burdening a third person, and one instance of improper ex parte communication with a judge.

In *Soileau* and *Harrington*, the harm which resulted following the respondents' misrepresentations to the courts was not as serious as that seen in the matter at hand. Here,

a violent criminal, Dwayne Small, was released from prison years before his scheduled date of release because of the misrepresentations made by the Respondent to Judge Parker.

Cases which involve the other types of misconduct in which the Respondent engaged in this matter include *In re Brass*, 00-0180 (La. 2/18/00); 752 So.2d 161, *In re Welcker*, 99-3239 (La. 1/14/00); 753 So.2d 177, and *In re Cohen*, 00-1476 (La. 9/15/00); 769 So.2d 531. In *Brass*, the Office of Disciplinary Counsel filed formal charges consisting of two counts of unethical misconduct. The first count alleged that Brass failed to take any action after being retained to handle a criminal matter. The second count alleged that Brass represented to a client that, for the payment of $15,000, Brass could have criminal charges dismissed. Brass initially filed a response denying the misconduct, but later filed a consent discipline petition admitting to the misconduct. The consent discipline proposed that Brass be suspended from the practice of law for a period of one year. Ultimately, the Court rejected this petition. *Id.* at 161-63.

After dismissal of the consent discipline petition, ODC filed a second set of formal charges alleging that on three occasions Brass failed to pursue a legal matter and then misrepresented to the clients the actual disposition of the matter. Brass also failed to refund any unearned fees in these matters. Brass filed a second consent discipline petition admitting the misconduct in both sets of formal charges and proposing that he be disbarred from the practice of law. The Court agreed and disbarred Mr. Brass. *Id.* at 162-64.

In *Welcker*, two sets of formal charges were filed against the respondent alleging a total of eighteen counts misconduct, including lack of diligence, failure to communicate, failure to protect the property of a client or third person, failure to supervise the conduct of a non-lawyer, commission of criminal acts, engaging in conduct prejudicial to the administration of justice, engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and failure to cooperate with ODC. *Id.* at 177-80. After formal charges were filed, Welcker filed a petition for consent discipline, admitting to most of the misconduct. The Court, after noting that Welcker had twice been disbarred for commingling and conversion of funds, extended the minimum period for readmission for an additional five years from the date of finality of this judgment. *Id.* at 180-81.

Finally, in *Cohen*, the Supreme Court held that disbarment was warranted for the respondent's misconduct which included numerous instances of neglect of client matters, failure to communicate with clients, failure to provide an accounting or return unearned fees and practicing law during periods of ineligibility. *Id.* at 531-34. The Court recognized that numerous aggravating factors were present, including prior discipline, pattern of misconduct, multiple offenses, obstruction of the disciplinary process, vulnerability of victims, lack of remorse, and indifference to making restitution. *Id.* at 535. The Court noted that the "sheer number of complaints against the respondent demonstrates in a convincing fashion that he has a complete lack of regard for the welfare of his clients and his professional obligations as a member of the bar of this state." *Id.*

Like the respondents in *Brass*, *Welcker* and *Cohen*, Mr. Pinkston has neglected his clients' legal matters, failed to communicate with his clients, and failed to render accountings or promptly return unearned fees. He has made false statements to the court, as did the respondents in *Soileau* and *Harrington*. His actions show his lack of regard for his clients and for his professional obligations as a member of the bar. The Board will adopt the recommendation of the hearing committee and recommend to the Court that the Respondent be disbarred. The Board will also recommend that the Respondent be ordered to make restitution to the aggrieved parties.

RECOMMENDATION

Based on the above, the Disciplinary Board adopts the report of the hearing committee in 99-DB-029 and modifies the report of the hearing committee in 00-DB-073 as noted above concerning the rule violations found in Counts I through III. The Board recommends that the Respondent, Donald O. Pinkston, be disbarred from the practice of law. The Board further recommends that the Respondent be ordered to make restitution to Mr. McDonald, Ms. Isaac, Ms. Motton and Ms. Nunnery and that he provide proof of previous restitution to made to Ms. Alston ($3,000) and Mr. McDonald ($1,750) upon submitting his application for readmission. The Board further recommends that the Respondent be assessed with all costs and expenses of these proceedings.

LOUISIANA ATTORNEY DISCIPLINARY BOARD
JUDY Y. BARRASSO
JOHN G. BECKWITH, SR.
REGINALD BROWN, SR.
WANDA A. DAVIS
DAVID R. FROHN
JAMES L. PATE
JACK O. WHITEHEAD, JR.

BY: _____
ROBERT E. LEAKE, JR.
FOR THE ADJUDICATIVE COMMITTEE

PETER T. DAZZIO – Not Participating.

APPENDIX B

PINKSTON, DONALD O.
99-DB-029 (05/09/01)

RECOMMENDATION OF HEARING COMMITTEE
IN RE: DONALD O. PINKSTON
NO. 99-DB-029

REPORT OF HEARING COMMITTEE #24

I. PROCEDURAL HISTORY

Formal charges were filed on April 21, 1999. Respondent filed an answer to the charges on June 2, 1999, and the matter was assigned to Disciplinary Committee No. #24. Pre-hearing memoranda were filed by Disciplinary Counsel on December 4, 2000, and by Respondent on December 11, 2000.

A hearing was held on December 14, 2000. Present were Herbert V. Larson, Jr., representing Respondent, and Charles B. Plattsmier, Chief Disciplinary Counsel. Mr. Larson waived the appearance of Respondent. The parties stipulated to the admissibility of ODC Exhibits 1 through 27, and respondent's Exhibit 1, and these were admitted. During the course of the hearing, ODC Exhibits 28 and 29 were admitted without objection.

At the conclusion of the hearing the matter was held open for (1) the receipt of the transcripts of the depositions of Judge Sharon Hunter, which was received on January 14, 2001 and (2) post-hearing memoranda which were filed by Disciplinary Counsel on January 24, 2001, and by Respondent on April 6, 2001.

A. BRIEF FACTUAL SETTING

Dwayne Small was a defendant in Orleans Parish Criminal District Court, charged with the commission of a homicide. It was on the docket of Judge Jerome Winsberg, Section "C". As part of a plea bargain, the District Attorney's Office reduced the charge to manslaughter in exchange for a guilty plea and a sentence of 21 years. Small was represented by Ernest Caulfield. The plea was accepted, a 21-year sentence was imposed by Judge Winsberg, and Small began serving his sentence in or about 1992.

Dwayne Small is the stepson of the Respondent. In 1995, Respondent enrolled as counsel of record for Mr. Small and filed, on Small's behalf, a "Motion to Correct Excessive Sentence," which was scheduled for hearing in February of 1996. Before the motion was heard, Judge Winsberg retired, effective January 1996, and the Louisiana Supreme Court appointed Ike Spears to sit as Judge Pro Tempore in Section "C" pending a new election.

At the February 1996 hearing, Respondent argued that the "Sentencing Guidelines Grid" required a shorter sentence for Small's crime. Judge Spears reset the matter for March 1996, and in the interim the District Attorney's office filed a memorandum in opposition to the Motion to Reduce Excessive Sentence. In his testimony before the Committee, Judge Spears acknowledged that he did not believe the Respondent's arguments for a sentence reduction had sufficient merit to withstand appellate review, but he was willing to entertain the motion because Respondent assured him that the District Attorney, Harry Connick, or someone within Mr. Connick's office, had agreed not to oppose the motion. The Assistant District

Attorney assigned to the case, Maurice Landrieu, who also testified before the Committee, could not confirm such an agreement. Judge Spears postponed the hearing of the motion several times to afford Respondent an opportunity to confirm the purported agreement not to oppose the motion, but Respondent was unable to do so.

On June 25, 1996, Judge Spears ruled on the motion and reduced Dwayne Small's sentence from 21 years to 12 years, but stayed the effect of the order to enable the State to file writs. On July 2, 1996, Mr. Landrieu filed a motion seeking reconsideration of the sentence reduction. Judge Spears kept the stay in place and again continued hearings of the State's motion to permit Respondent an opportunity to confirm his purported agreement with the District Attorney's office. Finally, On October 4, 1996, with Respondent present, Judge Spears granted the State's motion to reconsider and reinstated Dwayne Small's original 21 year sentence. At the request of Respondent, Judge Spears scheduled a status conference on the matter for November 1996.

Before that status conference, Sharon Hunter was elected to fill the vacancy in Section "C", and the matter passed to her. On November 15, 1996, she held a status conference, and the docket reflects that, "the status hearing considered held and satisfied," which in her deposition testimony the Judge said meant "nothing else was to be had." (Hunter Deposition, page 10). Small remained in prison.

For unexplained reasons, Dwayne Small's case appeared on the docket of Judge Julian Parker, Section "G", on March 21, 1997. On that day Respondent represented to the Court that, "I have had an opportunity to discuss

this matter with the Assistant District Attorney and pursuant to the conference that we held, I understand that a corrected minute entry needs to be sent to the Department of Corrections in this matter. We request the court to order a corrected minute entry be entered." (ODC Exhibit 8). Respondent represented to the court that Judge Spears had imposed a 12 year sentence on Dwayne Small, but that an error had been made and that the actual sentence should have been 9 years. Judge Parker reduced Small's sentence to 9 years. Small was released from prison.

Citizens in the community learned of Small's release and raised their concerns with the District Attorney's office. Maurice Landrieu asked Judge Parker to convene a hearing to review the circumstances of the release. A hearing was held on October 8, 1997, and Judge Parker asked Respondent how and why the case was transferred to his Court from Section "C". Respondent replied, "It was remanded to Section G by Judge Hunter. She recused herself." (ODC Exhibit 11). In a subsequent hearing on the same subject, how the matter got into Section "G", Respondent answered, "Your Honor, I have no idea. I have no connections with this building. I have no connections with Judge Hunter. I have no connections with the court. All I know is that the case was on the docket, I received a subpoena, I showed up." (ODC Exhibit 13). In a subsequent hearing before Judge Parker on this same issue, Mr. Landrieu informed the court that Judge Spears had reversed his reduction of the sentence and restored the original sentence of 21 years. Mr. Pinkston responded, "That's not true." (ODC Exhibit 19).

Judge Parker revoked his reduction of Small's sentence, and Respondent applied for writs to the Fourth Circuit Court of Appeal. That court requested a Per

Curiam from Judge Parker explaining the situation, and in that statement the Judge declared that his court had been "misled" by Respondent as to what sentence Judge Spears had actually imposed on Small, and by Respondent's representation that Judge Hunter had recused herself. (ODC Exhibit 21). In her deposition, Judge Hunter testified that she had not recused herself from the Dwayne Small case.

Each of the Assistant District Attorneys present in Judge Parker's court on the day that Respondent first brought the Dwayne Small matter before the Judge state that Respondent held no conference with them on the matter.

B. RULES ALLEGEDLY VIOLATED

Respondents conduct allegedly violated Rules of Professional Conduct 1.2(c), 3.3(a)(1), 3.3(a)(2), 3.3(a)(4), 8.4(c) and 8.4(a).

C. FACTUAL AND EVIDENTIARY FINDINGS

The Committee finds that the facts set forth in the preceding Section A are correct, and in addition specifically finds that:

1) Judge Ike Spears, sitting Pro tempore in Section "C", reversed his earlier reduction of the sentence of Dwayne Small and, on October 4, 1996, reinstated Mr. Small's original 21-year sentence.

2) Judge Sharon Hunter, Judge in Section "C", did not recuse herself from consideration of the Dwayne Small's case. The matter was marked closed on the docket

of Section "C". Judge Hunter did not allot the case to Section "G".

3) Respondent misrepresented to Judge Parker (a) that Judge Sharon Hunter had recused herself when she had not, (b) that Judge Spears had reduced Dwayne Small's sentence to 12 years when in fact the Court had reinstated the original 21 year sentence, and (c) that the minute entry by Judge Spears was erroneous and should be corrected to further reduce Dwayne Small's sentence to 9 years when there is no indication that Judge Spears ever intended to reduce Small's sentence to 9 years (and Mr. Spears testified that he never reduced the sentence to 9 years. Hearing Transcript, pages 86-91).

4) As a result of the misrepresentations by Respondent to the Court, Judge Parker signed a "corrected" minute entry that resulted in the temporary release of Dwayne Small from prison.

5) The testimony of Maurice Landrieu, Ike Spears, Judge Sharon K. Hunter, and Judge Julian Parker is credible with respect to the foregoing.

6) While no direct evidence establishes how the Dwayne Small case was moved onto Judge Parker's docket, both Judge Parker and Judge Hunter stated that they did not request or consent to the transfer. (ODC Exhibit 21; Hunter Deposition, page 13). If Respondent did not improperly cause the transfer, he nevertheless took advantage of it.

7) There was conflicting testimony as to whether an assistant district attorney was present when Judge Parker, on March 21, 1997, ordered Small's sentence

reduced, but this issue was not material to the Committee's findings or recommendations.

D. DETERMINATION OF RULES VIOLATED

Respondent's conduct violated Rules of Professional Conduct 3.3(a)(1), 3.3(a)(2), 3.3(a)(4), 8.4(a), 8.4(c), and 8.4(d).

II. BASELINE SANCTION

The baseline discipline is disbarment (Standards, Rule 6.11 and 7.1). Additionally, in the Pre-Hearing Memorandum Submitted on Behalf of Respondent Donald O. Pinkston, it is stipulated that: "The appropriate sanction for the charges brought by the Office of Disciplinary Counsel is disbarment, if the charges are proven by clear and convincing evidence. See In Re: Ronald A. Welker, 753 So.2d 177 (La. 2000)".

III. AGGRAVATING AND MITIGATING FACTORS

The primary aggravating factors are Respondent's prior discipline (a two-year suspension) and his substantial experience in the practice of law. The Committee finds, in mitigation, that Respondent has cooperated with the Office of Disciplinary Counsel and with the Disciplinary Board in these proceedings. Both Mr. Larson and Mr. Plattsmier conducted themselves in a highly professional manner.

IV. RECOMMENDATION

It is the Committee's recommendation that Respondent be disbarred and that he be assessed all costs of these proceedings.

New Orleans, Louisiana, this 8th day of May, 2001.

HEARING COMMITTEE #24
ANTHONY P. DUNBAR, Chair
JOAN M. VOGEL
RICHARD P. LEMMLER, JR.

APPENDIX C

PINKSTON, DONALD O.
00-DB-073 (03/08/01)

RECOMMENDATION OF HEARING COMMITTEE
IN RE: DONALD O. PINKSTON
NO. 00-DB-073

REPORT OF HEARING COMMITTEE #24

I. PROCEDURAL HISTORY

Formal charges were filed on June 12, 2000. Respondent filed an answer to the charges on July 5, 2000, and the matter was assigned to Disciplinary Committee No. #24. Pre-hearing memoranda were filed by Disciplinary Counsel on September 6, 2000, and by Respondent on September 14, 2000.

A hearing was held on September 14, 2000. Present were Respondent and his counsel, Herbert V. Larson, Jr., and Mimi T. Nguyen, Deputy Disciplinary Counsel. The parties stipulated to the admissibility of ODC Exhibits 1 through 40, and these were admitted. During the course of the hearing, Respondent's exhibits, marked D-1 though D-8, and ODC Exhibits 41 through 44, were admitted without objection. ODC Exhibit 45 was ruled inadmissible, and it was proffered by Deputy Disciplinary Counsel.

At the conclusion of the hearing the matter was held open for (1) the receipt of the transcripts of the depositions of Charles Martin, Kevin McDonald, David Singleton, and Robert Evans, which were received on October 17, 2000, (2) certain documents that Respondent said during the course of the hearing he wished to submit, which were

received on October 17 and 18, 2000, and (3) post-hearing memoranda which were filed by Disciplinary Counsel on November 30, 2000, and by Respondent on December 1, 2000.

COUNT ONE:

KENNETH McDONALD

A. BRIEF FACTUAL SETTING

Mr. McDonald, represented by Frank DeSalvo in a Federal criminal matter, paid Respondent $3,500.00 for representation. There was no written contract between them. Respondent maintained that the gist of his employment was to attempt to negotiate a favorable plea arrangement or sentence; Mr. McDonald maintained that Respondent was retained to arrange an expeditious bond hearing, obtain a favorable sentence, and, if no plea agreement were reached, to handle McDonald's appeal. Respondent met with McDonald several times in jail and testified that he spoke several times with an Assistant U.S. Attorney. Mr. McDonald did not get a bond hearing, a sentence he deemed favorable, or get help with his appeal. Respondent has not rendered an accounting for his services; he maintains he was retained on a "flat fee" basis. Mr. McDonald demanded a refund of unearned fees, but Respondent failed to deliver a refund or place any portion of the fee in trust.

B. RULES ALLEGEDLY VIOLATED

Respondents conduct allegedly violated Rules of Professional Conduct *1.3*, *1.4*, *1.5*(f)(6), *1.15*, *1.16*(d), and *8.4*.

C. FACTUAL AND EVIDENTIARY FINDINGS

Without a written engagement, it is difficult to determine what Respondent was engaged to do, but the committee finds credible Mr. McDonald's deposition testimony that he retained respondent to use his influence with the U.S. Attorney to get a bond hearing set and, failing that, to work out a favorable sentence, and, failing that, to handle the matter on appeal. (Deposition, pages 5-7). We find that Respondent spent some time on this case, though the exact amount cannot be determined from the testimony, the evidence, or Respondent's records, and that he was unsuccessful in obtaining any results for Mr. McDonald. Based upon the testimony of Respondent and Mr. McDonald, we conclude that, while Respondent may not have explicitly promised a specific result, Mr. McDonald reasonably believed that, for $3,500.00, Respondent would successfully obtain a bond hearing or favorable sentencing, and that Respondent failed to do so.

D. DETERMINATION OF RULES VIOLATED

Respondent's conduct violated Rule *1.5*(f)(6).

COUNT TWO:

AMMIE ISAAC/EMMANUEL ISAAC

A. BRIEF FACTUAL SETTING

Mr. Isaac's mother retained Respondent to represent her son, post-conviction, in State court at his sentencing hearing and to handle his appeal. There was no written contract between them. She claims to have paid Respondent $5,000.00, and he states he received $3,000.00. Respondent filed and argued a motion for a new trial and appeared at the sentencing hearing, but thereafter failed

to communicate consistently with Ms. Isaac or her son. Over the next year and a half, Respondent was granted numerous extensions of time by the Court of Appeal to produce a trial transcript and to file his appeal brief, but he failed to file the brief until shortly after the disciplinary complaint was filed. A month later, Respondent was suspended from the practice of law on other charges, and Ms. Isaac hired a new attorney to take over the appeal. Respondent has not rendered an accounting for his services; he maintains he was retained on a "flat fee" basis. Ms. Isaac demanded a refund of unearned fees, but Respondent failed to deliver a refund or place any portion of the fee in trust.

B. RULES ALLEGEDLY VIOLATED

Respondent's conduct allegedly violated Rules of Professional Conduct *1.3* and *1.16*(d).

C. FACTUAL AND EVIDENTIARY FINDINGS

Based upon the receipts introduced into evidence, the Committee finds that Respondent was paid $3,000.00 to represent Mr. Isaac. We find that Respondent was retained in or about March of 1997. We find that the record was lodged with the Court of Appeal on January 28, 1998 and that respondent's brief was filed in November 1998 (ODC Exhibit #11). We find that Respondent failed diligently to pursue Mr. Isaac's appeal and failed to communicate adequately with his client or Ms. Isaac about the status of the case. We find that he appeared in court on Mr. Isaac's behalf on at least two occasions, and that he did ultimately file an appeal brief on his client's behalf.

D. DETERMINATION OF RULES VIOLATED

Respondent's conduct violated Rule *1.3* and, though he was not formally charged with the following, Rules *1.4* and *1.5*(f)(6).

COUNT THREE:

DAVID SINGLETON

A. BRIEF FACTUAL SETTING

The son of Mr. Singleton paid Respondent $1,500.00 to attempt to secure a sentence reduction on behalf of his father, who had been incarcerated for 25 years. There was no written contract between them. Mr. Singleton testified in his deposition that Respondent did not guarantee success. (Deposition, page 7). Respondent accepted seven or eight collect calls from Mr. Singleton over the following two years and obtained copies of Mr. Singleton's medical records in order to make a case for a sentence reduction of a transfer for his client. (A copy of those records is included in Respondent's post-hearing submission). Respondent testified that he spoke on one occasion to the trial judge about the matter, and spoke with Mr. Singleton's wife on several occasions. Mr. Singleton has demanded a partial refund of the fees paid to Respondent.

B. RULES ALLEGEDLY VIOLATED

Respondents conduct allegedly violated Rules of Professional Conduct *1.3*, *1.4*, and *1.16*(d).

C. FACTUAL AND EVIDENTIARY FINDINGS

The Committee finds that the facts set forth in Section I above are correct.

D. DETERMINATION OF RULES VIOLATED

The Committee finds no clear and convincing evidence that Respondent violated any ethical rule.

COUNT FOUR:

FELISIA N. ALSTON

A. BRIEF FACTUAL SETTING

There is no dispute that respondent agreed to participate in the Louisiana State Bar Association Alternative Dispute Resolution Program and was ordered to pay $3,000.00 to a former client. Respondent testified that he has paid $1,000.00 of this amount, and there is no evidence to the contrary. Respondent has failed to pay the rest of the amount due.

B. RULES ALLEGEDLY VIOLATED

Respondents conduct allegedly violated Rules of Professional Conduct 8.1(a), 8.4(a)(c)and (d).

C. FACTUAL AND EVIDENTIARY FINDINGS

The Committee finds that the facts set forth in Section I above are correct.

D. DETERMINATION OF RULES VIOLATED

Respondent's conduct violated Rules *8.4*(a) and (d).

COUNT FIVE:

CHARLES MARTIN

A. BRIEF FACTUAL SETTING

Mr. Martin, charged in Mississippi with murder, asked Respondent to represent him in the matter. Respondent

contacted Robert Evans, a part-time public defender in Jefferson County, Mississippi, who had been appointed to defend Mr. Martin, and made arrangements for Respondent to enroll as co-counsel. Advised by Evans of the rules for appearing Pro Hac Vice in Mississippi, Respondent testified that he took the steps necessary to file the required documents with the Mississippi Circuit Court. Respondent did appear in Mississippi court on two occasions, but Mr. Evans, and not Respondent, attended the hearing at which Mr. Martin entered a guilty plea. Mr. Martin subsequently filed complaints with both the Louisiana and Mississippi Bar Associations, alleging that Respondent was not authorized to practice law in Mississippi. The Mississippi Bar Association, hearing these same charges, found "no conduct of said attorney which would warrant any action under the disciplinary rules governing lawyers practicing in this state." (ODC Exhibit #19).

B. RULES ALLEGEDLY VIOLATED

Respondent's conduct allegedly violated Rule of Professional Conduct *5.5* (In addition, a violation of Rule *8.1*(a) is alleged in Disciplinary Counsel's Post-Hearing Memorandum.)

C. FACTUAL AND EVIDENTIARY FINDINGS

The Committee finds that the facts set forth in Section I above are correct.

D. DETERMINATION OF RULES VIOLATED

The Committee finds no clear and convincing evidence that Respondent violated any ethical rule.

COUNT SIX:

HILDA JONES

A. BRIEF FACTUAL SETTING

Mrs. Jones retained Respondent to handle a criminal matter for her son and paid Respondent $1,000.00 on February 16, 1999. She also paid $1,200.00 to Melvin Winins the same day. (ODC Exhibit #36). Respondent says, "Mr. Winins is an investigator I have frequently used in the past." (ODC Exhibit #38). Respondent denied he received any portion of the $1,200.00 paid to Mr. Winins. Ms. Jones apparently understood that Winins was not a lawyer, but her confusion on this issue is obvious. (ODC Exhibit #40). On the day he received his check, or the next day, Respondent learned that his petition for a rehearing in the Louisiana Supreme Court had been denied, and that he was suspended from the practice of law. Respondent did not immediately return the $1,000.00 to Ms. Jones, though he testified that at his request another lawyer did go to court on the son's behalf. In August of 1999, after he was notified that Ms. Jones had filed a disciplinary complaint, Respondent refunded $1,000.00 to Ms. Jones.

B. RULES ALLEGEDLY VIOLATED

Respondents conduct allegedly violated Rules of Professional Conduct *1.16*(d).

C. FACTUAL AND EVIDENTIARY FINDINGS

The Committee finds that the facts set forth in Section I above are correct.

D. DETERMINATION OF RULES VIOLATED

Respondent's conduct violated Rule *1.16*(d).

COUNT SEVEN:

AGNES MOTTON and ZINA NUNNERY

A. BRIEF FACTUAL SETTING

Frank Motton was sentenced to a lengthy sentence in 1979 and filed an application for post-conviction relief. Ms. Motton and Ms. Nunnery retained Respondent in 1995 to represent Mr. Motton in his attempt to obtain a hearing on his application and paid him $2,300.00. Receipts were issued to Zina Nunnery for $700.00 and to Agnes Motton for $1,600.00. (ODC Exhibit #27). Over the next three years Respondent filed three writs of habeas corpus to have Mr. Motton brought to the district court for a hearing on Motton's application, but each time the matter was continued. When Respondent was suspended from practice, another attorney took over the case in 1999. Respondent admits that he did not earn the entirety of his fee. (See Respondent's Post-Hearing Memorandum, page 7). The complaint alleged, among other things, that Respondent failed to keep his clients informed about the status of their case, and there is no credible evidence that Respondent did communicate fully with his clients.

B. RULES ALLEGEDLY VIOLATED

Respondents conduct allegedly violated Rules of Professional Conduct *1.3*, *1.4*, *1.5*(f)(6), and *1.16*(d).

C. FACTUAL AND EVIDENTIARY FINDINGS

The Committee finds that the facts set forth in Section I above are correct, and further that Respondent did not

obtain for his clients the result they reasonably believed he had undertaken to obtain.

D. DETERMINATION OF RULES VIOLATED

Respondent's conduct violated Rules *1.3* and *1.5*(f)(6).

II. BASELINE SANCTION

As set forth above with respect to the individual counts, the Committee has found violations of Rules of Professional Conduct *1.3*, *1.4*, *1.5*(f)(6), *1.16*(d), and *8.4*(a) and (d). The baseline discipline is suspension when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client (Standards 4.12) and when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client or engages in a pattern of neglect and causes injury or potential injury to a client (Standards 4.42).

III. AGGRAVATING AND MITIGATING FACTORS

The primary aggravating factors are Respondent's prior discipline and the pattern of misconduct reflected in the matters at hand. While the misconduct alleged in the foregoing complaints occurred before Respondent's two-year suspension became effective, the judgment of the Supreme Court of Louisiana in that matter (involving charges of failure to maintain client funds in trust) noted that Respondent had even then been the subject of prior discipline. The Court noted that: "In January 1997, respondent was reprimanded by the disciplinary board for misleading clients, failing to return an unearned fee, and commingling funds. . . . Respondent was also admonished four times between 1994-1995 for failure to cooperate by not filing written answers to complaints." (ODC Exhibit

#44, FN4). Thus, the Committee finds that the misconduct found in the complaints now before the Committee do arise from actions in disregard of prior discipline.

The Committee finds, in mitigation, that Respondent has cooperated with the Office of Disciplinary Counsel and with the Disciplinary Board in these proceedings.

IV. RESTITUTION

With respect to the complaint of Kenneth McDonald (Count One), the Committee finds that Mr. McDonald is due restitution in the amount of $3,500.00, the entire fee paid to Respondent.

With respect to the complaint of Ammie Isaac (Count Two), the Committee finds that Ms. Isaac is due restitution in the amount of $3,000.00, the entire fee paid to Respondent.

With respect to Count Four, Respondent admits he has failed to make restitution to a former client, as set by the arbitrator, in the amount of $2,000.00, and he should be required to do so.

With respect to the complaint of Agnes Motton and Zina Nunnery (Count Seven), the Committee finds that Agnes Motton is due restitution in the amount of $1,600.00, the entire fee she paid to Respondent, and that Zina Nunnery is due restitution in the amount of $700.00, the entire fee she paid to Respondent.

V. RECOMMENDATION

It is the Committee's recommendation that Respondent be suspended from the practice of law for thirty (30)

months and be required to file a petition for reinstatement. In addition this Committee recommends that prior to his reinstatement Respondent be required to pay restitution to Kenneth McDonald in the amount of $3,500.00, to Ammie Isaac in the amount of $3,000.00, to Felisia N. Alston in the amount of $2,000.00, to Agnes Motton in the amount of $1,600.00, and to Zina Nunnery in the amount of $700.00. Further, the Committee recommends that Respondent be assessed the costs of these disciplinary proceedings pursuant to Rule *XIX*(10)(A)(7).

New Orleans, Louisiana, this 7th day of March, 2001.

HEARING COMMITTEE #24

ANTHONY P. DUNBAR, Chair
JOAN M. VOGEL
RICHARD P. LEMMLER, JR.